No. 03-1028 Status: DECIDED
Title: Raymond L. Middleton, Warden, Petitioner
v.
Sally Marie McNeil
Docketed: January 20, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-56565)
Decision Date: September 22, 2003
Rehearing Denied: October 29, 2003

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 14 2004	Petition for a writ of certiorari filed. (Response due February 19, 2004)
Feb 5 2004	Application (03A667) for a stay of judgment pending disposition of petition for writ of certiorari, submitted to Justice O'Connor.
Feb 9 2004	Application (03A667) denied by Justice O'Connor.
Feb 19 2004	Brief of respondent Sally Marie McNeil in opposition filed.
Feb 19 2004	Motion for leave to proceed in forma pauperis filed by respondent Sally Marie McNeil.
Feb 23 2004	*Affidavit in support of Motion IFP received.
Mar 3 2004	DISTRIBUTED for Conference of March 19, 2004.
Mar 22 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 22 2004	Record Requested .
Mar 25 2004	Record received from U.S.C.A. 9th Circuit. (1 envelope)
Mar 26 2004	Record received from U.S.D.C. - Southern Dist. of CA (1 box)
Mar 31 2004	DISTRIBUTED for Conference of April 16, 2004.
Apr 19 2004	DISTRIBUTED for Conference of April 23, 2004.
Apr 26 2004	DISTRIBUTED for Conference of April 30, 2004.
May 3 2004	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 3 2004	Judgment REVERSED and case REMANDED. Opinion per curiam. (Detached Opinion)

(3)

Per Curiam

SUPREME COURT OF THE UNITED STATES

RAYMOND L. MIDDLETON, WARDEN *v.* SALLY MARIE McNEIL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1028. Decided May 3, 2004

PER CURIAM.

I

Respondent Sally Marie McNeil killed her husband after an argument over his infidelity and spending habits. The State of California charged her with murder. Respondent's theory at trial was that her husband had tried to strangle her during the argument, but that she had escaped, fetched a shotgun from the bedroom, and killed him out of fear for her life. Fingernail marks were indeed found on her neck after the shooting. She testified that her husband had been abusive, and a defense expert opined that she suffered from Battered Women's Syndrome. The State countered with forensic evidence showing that the fingernail marks were not her husband's and may have been self-inflicted, and with the testimony of a 911 operator who overheard respondent tell her husband she had shot him because she would no longer tolerate his behavior.

Under California law, "[m]urder is the unlawful killing of a human being . . . with malice aforethought." Cal. Penal Code Ann. §187(a) (West 1999). The element of malice is negated if one kills out of fear of imminent peril. *In re Christian S.*, 7 Cal. 4th 768, 773, 872 P. 2d 574, 576 (1994). Where that fear is unreasonable (but nevertheless genuine), it reduces the crime from murder to voluntary manslaughter—a doctrine known as "imperfect self-defense." *Ibid.* At respondent's trial, the judge instructed

the jury on these concepts as follows:

> "'The specific intent for voluntary manslaughter, as opposed to murder, must arise upon one of [the] following circumstances:
>
> . . . . . .
>
> "'[A]n honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. That would be imperfect self-defense.
>
> . . . . . .
>
> "'To establish that a killing is murder [and] not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done . . . in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or to great bodily injury.
>
> . . . . . .
>
> "'A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.
>
> "'An "imminent" peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person.'" App. to Pet. for Cert. 31–33.

The last four words of this instruction—"'as a reasonable person'"—are not part of the relevant form instruction, 1 California Jury Instructions, Criminal, No. 5.17 (6th ed. 1996), and were apparently included in error. The prosecutor's closing argument, however, correctly stated the law.

Respondent was convicted of second-degree murder and appealed on the basis of the erroneous jury instruction. The California Court of Appeal acknowledged the error but upheld her conviction, reasoning:

> "[R]eversal is not required because '[e]rror cannot be predicated upon an isolated phrase, sentence or excerpt from the instructions since the correctness of an instruction is to be determined in its relation to the other instructions and in light of the instructions as a whole.' Here, when all of the jury instructions on voluntary manslaughter and imperfect self-defense, are considered in their entirety, it is not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter. On the contrary, these instructions repeatedly informed the jury that if the defendant had an honest (or actual) but *unreasonable* belief in the need to act in self-defense, then the offense would be manslaughter and the defendant could not be convicted of murder. Furthermore, in arguing to the jury, the prosecutor set forth the appropriate standard, stating '[i]f you believe it is an imperfect self-defense, that she actually believed but that a reasonable person would not believe in the necessity for self-defense, that lessens the crime to what is called, "voluntary manslaughter."'" App. to Pet. for Cert. 33–34 (citations omitted).

Respondent then sought federal habeas relief. The District Court denied her petition, but the Ninth Circuit reversed. 344 F. 3d 988 (2003). We now grant the State's

petition for a writ of certiorari and respondent's motion for leave to proceed *in forma pauperis*, and reverse.

II

A federal court may grant habeas relief to a state prisoner if a state court's adjudication of his constitutional claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). "Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." *Yarborough* v. *Gentry*, 540 U. S. 1, ___ (2003) (slip op., at 4–5) *(per curiam)*; see *Williams* v. *Taylor*, 529 U. S. 362, 409 (2000).

In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. See *Sandstrom* v. *Montana*, 442 U. S. 510, 520–521 (1979). Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *Estelle* v. *McGuire*, 502 U. S. 62, 72 (1991) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973)). "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde* v. *California*, 494 U. S. 370, 378 (1990) (quoting *Cupp*, *supra*, at 146–147). If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle*, *supra*, at 72 (quoting *Boyde*, *supra*, at 380).

The Ninth Circuit held that the erroneous imminent-peril instruction "eliminated" respondent's imperfect self-defense claim, and that the state court unreasonably applied federal law by "completely ignor[ing] unchallenged and uncorrected instructions to the jury." 344 F. 3d, at 999. It acknowledged that it was bound to consider the jury charge as a whole, but held that the other instructions were irrelevant because "[t]he only time that the trial judge actually defined imminent peril for the jury was in the erroneous instruction on imperfect self-defense." *Id.*, at 997.

This conclusion failed to give appropriate deference to the state court's decision. Contrary to the Ninth Circuit's description, the state court did not "ignor[e]" the faulty instruction. It merely held that the instruction was not reasonably likely to have misled the jury given the multiple other instances (at least three, see *supra*, at 2) where the charge correctly stated that respondent's belief could be unreasonable. App. to Pet. for Cert. 34. Given three correct instructions and one contrary one, the state court did not unreasonably apply federal law when it found that there was no reasonable likelihood the jury was misled.

The Ninth Circuit thought that the other references to unreasonableness were irrelevant because they were not part of the definition of "imminent peril." That alone does not make them irrelevant; whether one defines imminent peril in terms of an unreasonable belief or instead describes imperfect self-defense as allowing an unreasonable belief in imminent peril, the import of the instruction is the same. Perhaps the Ninth Circuit reasoned that the erroneous definition of "imminent peril" caused the jury to believe that the earlier, correct instructions ("actual but unreasonable belief in the necessity to defend against imminent peril") meant that, although the belief in the necessity to defend may be unreasonable, the belief in the *existence* of the "imminent peril" may not. This interpretation would require such a rare combination of extremely refined lawyerly parsing of an instruction, and extremely gullible acceptance of a result that makes no conceivable

sense, that the state court's implicit rejection of the possibility was surely not an *unreasonable* application of federal law.

The Ninth Circuit also faulted the state court for relying on the prosecutor's argument, noting that instructions from a judge are presumed to have more influence than arguments of counsel. 344 F. 3d, at 999 (citing *Boyde, supra*, at 384). But this is not a case where the jury charge clearly says one thing and the prosecutor says the opposite; the instructions were at worst ambiguous because they were internally inconsistent. Nothing in *Boyde* precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge. This assumption is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*.

The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court, U.S.
FILED

No. 03-1028 JAN 14 2004

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND L. MIDDLETON, Warden, *Petitioner*

v.

SALLY MARIE McNEIL, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of analysis under the Antiterrorism and Effective Death Penalty Act of 1996, does clearly established federal law foreclose a state reviewing court from considering the concession of the prosecution in argument to the jury when determining, under *Estelle v. McGuire*, 502 U.S. 62 (1991) and *Boyde v. California*, 494 U.S. 370 (1990), whether there is a reasonable probability that the jury misunderstood a state trial court's instructions?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

RAYMOND L. MIDDLETON, Warden, *Petitioner*

v.

SALLY MARIE McNEIL, *Respondent*

Petitioner, Raymond L. Middleton, Warden, Valley State Prison for Women, Chowchilla, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 23, 2003, and is reported at 344 F.3d 988 (9th Cir. 2003). On October 29, 2003, the Ninth Circuit Court of Appeals denied Petitioner's petition for rehearing. A copy of the opinion is attached to this petition, as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTE

28 U.S.C. § 2254(d), part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding.

STATEMENT OF THE CASE

Respondent Sally McNeil had a tumultuous relationship with her husband, Ray McNeil, and, on February 14, 1995, she killed him in their apartment by firing two shots at him. The second shot was fired after the victim was lying helpless on the floor.

McNeil was tried by jury on charges of murder, California Penal Code section 187, in the San Diego County Superior Court. The trial court instructed the jury under the doctrine of "imperfect self-defense,"-according to which if a defendant unlawfully killed while having an actual belief in the need to kill in self-defense, but that belief was unreasonable, the defendant is guilty of voluntary manslaughter, rather than murder. *In re Christian S.*, 7 Cal. 4th 768, 783, 872 P.2d 574, 30 Cal. Rptr. 2d 33 (1994); *People v. Flannel*, 25 Cal. 3d 668, 67-680, 603 P.2d 1, 160 Cal. Rptr. 84 (1979). In charging the jury with this doctrine, the trial court's instructions in part

erroneously informed the jury that "[a]n 'imminent' peril is one that is apparent, present, and immediate and must be instantly dealt with or must so appear a the time to the slayer *as a reasonable person*." (Emphasis added.) App. B at 31-34. Elsewhere in its instructions, however, the trial court correctly instructed the jury that, according to the doctrine of "imperfect self-defense," the crime is voluntary manslaughter, as opposed to murder, where the intent to kill arises upon the "honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." App. B at 31-32.

In closing argument to the jury, the prosecutor conceded that the crime was only voluntary manslaughter if McNeil actually believed, albeit unreasonably, that she was acting in self-defense. The prosecutor stated:

> If you believe that it is an imperfect self-defense, that she actually believed but that a reasonable person would not believe in the necessity for self-defense, that lessens the crime to what is called, "voluntary manslaughter."

App. B at 34.

The jury rejected the notion that McNeil acted in imperfect self-defense and convicted her of second degree murder, California Penal Code section 187(a), with the personal use of a firearm, California Penal Code section 12022.5(a). On April 19, 1996, the San Diego County Superior Court sentenced her to state prison for a term of nineteen years to life.

On June 18, 1998, the California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment on direct appeal and denied a companion petition for a writ of habeas corpus. App. B at 26-38. The California Court of Appeal determined that the jury correctly understood the relevant law concerning California's doctrine of "imperfect self-defense," despite having been given conflicting jury instructions. In reaching this conclusion, the state court

considered the fact that the prosecution's argument to the jury correctly stated the law to the benefit of McNeil. App. B at 34.

Subsequently, the California Supreme Court denied without opinion McNeil's petition for review of the decision of the court of appeal.

McNeil filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of California, which dismissed the petition with prejudice. Apps. C & D at 39-84. The district court, in deciding that there was not a reasonable likelihood that the jury misunderstood the conflicting instructions, found that the state court acted reasonably by considering the prosecution's correct statement of law in argument to the jury. App. C at 67-72.

On September 23, 2003, the Ninth Circuit Court of Appeals issued an opinion reversing the judgment of the district court with instructions to grant the petition for writ of habeas corpus and to issue a writ containing conditions the district court finds to be appropriate. App. A at 1-25. Writing for the court, Judge Paez ruled that the state court of appeal (1) had acted unreasonably within the meaning of 28 U.S.C. § 2254(d) by "completely ignor[ing]" the incorrect instruction and finding that the jury had correctly understood the law after receiving conflicting jury instructions relating to California's doctrine of "imperfect self-defense" and (2) had acted contrary to established Supreme Court precedent by considering the prosecution's argument to the jury on the issue of the conflicting instructions. App. A at 13-25. On October 29, 2003, the Ninth Circuit Court of Appeals denied Petitioner-Appellee's petition for rehearing. App. E at 85.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to consider whether, when assessing the impact of a trial judge's conflicting instructions, for purposes of deciding whether there is a "reasonable likelihood" that the jury unconstitutionally applied those

instructions, a state reviewing court may consider the prosecutor's concession during closing argument concerning the correct rule. The holding of the Ninth Circuit conflicts with language of this Court in *Boyde v. California*, 494 U.S. 370 (1990), which recognized that, in an appropriate case, argument by the prosecutor may be examined in determining whether there is a reasonable likelihood the jury misunderstood the trial court's instructions.

Moreover, even assuming that a state reviewing court may not look to the argument of trial counsel in determining whether the jury correctly understood the charge, such a principle was certainly not clearly established at the time of the state court decision in the present case. The decision by the Ninth Circuit Court of Appeals therefore conflicts with relevant decisions of this Court relating to AEDPA. This conflict, however, is not merely a case of simple error. As this case demonstrates, the Ninth Circuit has, once again, provided no more than lip service to the deference required to be given to state court decisions under AEDPA. The Ninth Circuit has demonstrated a repeated readiness to attribute error that is inconsistent with the presumption of correctness attaching to state court determinations. Certiorari must be granted so that this Court can exercise its supervisory authority to compel the Ninth Circuit to comply with AEDPA.

A. In Determining Whether A Jury Misunderstood Conflicting Jury Instructions, A Reviewing Court May Consider The Argument Of The Prosecution To The Jury

This Court has held that, when considering whether there is a "reasonable likelihood" that a jury unconstitutionally applied unclear instructions, the reviewing court must consider all the instructions as a whole. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). In *Boyde*, 494 U.S. 370, this Court stated, "A single instruction to a jury may not be judged in artificial isolation, but

must be viewed in the context of the overall charge." *Boyde*, 494 U.S. 370 at 378.

The state court of appeal, noting the trial court repeatedly told the jury that an honest but unreasonable belief in the need to act in self-defense reduced murder to manslaughter, and noting the prosecutor's argument, held that it was not reasonably likely that the jury would have misunderstood the elements of "imperfect self-defense." However, the Ninth Circuit discounted the state court's reliance on the prosecutor's argument, citing decisions of this Court to the effect that the instructions from a judge carry more weight than argument by counsel concerning those instructions. App. A at 21-22.

The Ninth Circuit stated:

> [T]he state court's reliance on the prosecutor's argument to support its conclusion that the verdict was not prejudiced by the erroneous instructions contradicts clearly established Supreme Court law. We have repeatedly recognized (and the Supreme Court has long held) that instructions from a judge carry more weight than instructions from counsel, *see, e.g., Boyde,* 494 U.S. at 384. . . .

App. A at 21.

In *Boyde*, this Court did note that "arguments of counsel generally carry less weight with a jury than do instructions from the court." 494 U.S. at 384. But, in *Boyde,* the prosecutor allegedly misstated the law in a manner detrimental to the position of the defendant. This Court has never suggested that, in a case where instructional language is unclear, a reviewing court, in making an analysis pursuant to *Estelle*, 502 U.S. at 72, may not consider argument by a prosecutor which correctly states the law in a manner *helpful* to a defendant. Indeed, in concluding that a prosecutor's argument on a point of law carries less weight than the court's instructions, this Court

implied that the prosecutor's arguments have some weight and jurors do consider the statement of counsel as to the law. Therefore, a reviewing court may properly take the prosecutor's argument into account. The Ninth Circuit's ruling thus conflicts with this Court's decision in *Boyde*.

B. Even If A State Reviewing Court Should Not Consider A Prosecutor's Concession During Closing Argument In Determining Whether The Jury Misunderstood Conflicting Instructions, Doing So Is Not "Contrary To" Or "An Unreasonable Application Of" Clearly Established Federal Law, As Determined By This Court

A state court's decision is "contrary to" this Court's precedent under AEDPA if the state court "arrives at a conclusion opposite to that reached" by this Court on a question of law. *Williams v. Taylor*, 529 U.S. 362, 405, 412-13 (2000). A state court's decision may be an "unreasonable application" of this Court's precedent if the state court either (1) identifies the correct governing legal rule, but applies it to a new set of facts in a way that is objectively unreasonable; or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Id.* at 407-08.

While giving lip service to the AEDPA deference standard, Appendix A at 19-20, the Ninth Circuit concluded that the state court of appeal's conclusion was objectively unreasonable. App. A at 20. But the Ninth Circuit itself unreasonably focused on the erroneous instruction given by the trial court and minimized the effect of the correct instructions given by the trial court on "imperfect self-defense." Furthermore, the Ninth Circuit stated that the state court "completely ignored unchallenged and uncorrected instructions to the jury." App. A. at 21. But the state court expressly recognized that the trial court erred by using the term "as a reasonable person" when defining "imminent peril." App. B at 33. That court concluded:

> [W]hen all of the jury instructions on voluntary manslaughter and imperfect self-defense[,] are considered in their entirety, it is not reasonably likely that the jury would have understood the requirements of the imperfect self-defense component of voluntary manslaughter. (Citations.)

App. B at 33-34.

Moreover, the Ninth Circuit is simply wrong in finding that *Boyde* precluded the state court of appeal from relying on the argument of the prosecutor in making its determination that there was not a "reasonable likelihood" that the jury misunderstood the law. This Court has never suggested that, in a case where instructional language is unclear, a reviewing court, in making an analysis pursuant to *Estelle*, 502 U.S. at 72, cannot consider argument by a prosecutor which correctly states the law in a manner helpful to a defendant.

Once again, the Ninth Circuit has refused to give California courts the deference which AEDPA requires. *Cf. Early v. Packer*, 537 U.S. 3, 4-11 (2002); *Woodford v. Visciotti*, 537 U.S. 19, 20-27 (2002); *Yarborough v. Gentry*, 124 S. Ct. 1, 2-6, 157 L. Ed. 2d 1 (2003); *see Mitchell v. Esparza*, 124 S. Ct. 72 (2003) (Sixth Circuit).

Additionally, in *Payton v. Woodford*, 346 F.3d 1204 (2003), the Ninth Circuit, in a recent 6-to-5 en banc decision again authored by Judge Paez, reversed a death penalty judgment, even though the jury was properly instructed, because the prosecutor made an erroneous argument to the jury concerning an instruction.[1/] In contrast, in the present case, the Ninth Circuit assumed that the jury would not heed the prosecution's argument concerning the instructions. It is

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1. Petitioner will be filing a petition for a writ of certiorari from that decision.

> incongruous for the Ninth Circuit, in one case, to cite the argument of a prosecutor in determining that a jury misunderstood an instruction, while, in another case, find it unreasonable for a state appellate court to consider a concession made by the prosecution in argument to the jury in finding that there was not a reasonable probability that a jury misunderstood an instruction.

CONCLUSION

Petitioner respectfully requests that this petition be granted.

Dated: January 14, 2004

Respectfully submitted,

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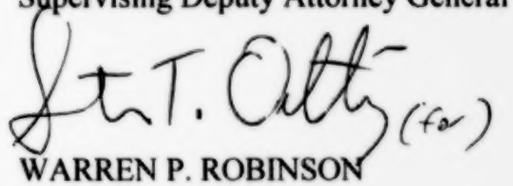

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APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALLY MARIE McNEIL,	)
	)
Petitioner-Appellant,	) No. 01-56565
	)
v.	) D.C. No.
	) CV 99-01490-JM
RAYMOND L. MIDDLETON;	)
BILL LOCKYER,	) OPINION
	)
Respondents-Appellees.	)
	)

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted
April 8, 2003–Pasadena, California

Filed September 22, 2003

Before: Robert R. Beezer, Ferdinand F. Fernandez, and
Richard A. Paez, Circuit Judges.

Opinion by Judge Paez

COUNSEL

Peter B. Clarke, Escondido, California; Charles R. Khoury, Jr., Wilton, New Hampshire, for the petitioner-appellant.

Warren P. Robinson, Deputy Attorney General, San Diego, California, for the respondent-appellee.

OPINION

PAEZ, Circuit Judge:

Sally Marie McNeil ("McNeil") appeals the district court's denial of her federal habeas petition, challenging the constitutional validity of her state court conviction for second degree murder. We have jurisdiction under 28 U.S.C. § 2254, and we reverse the district court's judgment and remand with directions to grant the petition.

In 1996, a California jury convicted McNeil for the second degree murder of her husband, Ray McNeil ("Ray"). At trial, McNeil admitted that she shot and killed Ray, but testified that she acted in self-defense because at the time of the killing she feared that her life was in imminent danger. McNeil also testified that Ray physically and sexually abused her throughout their marriage. In support of her defense, McNeil presented an expert witness who testified that McNeil suffered from the effects of Battered Women's Syndrome ("BWS").[1] This

1. We recognize, as the California Supreme Court did in *People v. Humphrey*, 13 Cal. 4th 1073, 1083 n.3 (Cal. 1996),

evidence was presented to show that McNeil's perception of imminent danger at the time of the killing was reasonable, genuine, and actual.[2]

At the conclusion of the trial, the court instructed the jury on first degree murder, second degree murder, voluntary manslaughter, and self-defense. As part of these instructions the court, as required by California law, instructed the jury that self-defense requires an actual and reasonable belief in the necessity of defending against imminent peril or great bodily harm. Although the court allowed McNeil to present BWS evidence, it instructed the jury that it could not consider this evidence in determining the reasonableness of McNeil's belief in her need to resort to self-defense by fatally shooting Ray. As the State

that the use of the terminology "Battered Women's Syndrome" is not an accurate description of the psychological, physical, and emotional consequences of battery and abuse that the word was intended to capture. However, because we are presented in this case with a state court record and decision, we refer to the terminology the state court used when addressing McNeil's claims.

2. In 1991, the California legislature adopted section 1107 of the Evidence Code, codifying the admissibility of Battered Women's Syndrome evidence. The legislature defined BWS in part as "the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence." Evidence of Battered Women's Syndrome is now commonly accepted in state and federal courts. *See*, e.g., *Moran v. Ohio*, 469 U.S. 948, 950 n.2 (1984) (describing Battered Women's Syndrome and its acceptance as a legal theory of self-defense testimony); *DePetris v. Kuykendall*, 239 F.3d 1057, 1060 (9th Cir. 2001) (describing expert BWS testimony); *People v. Humphrey*, 13 Cal. 4th at 1077-79.

concedes, this limiting instruction was erroneous under California law.

As noted, the court also instructed the jury on voluntary manslaughter. Under California law, a person is not guilty of murder if the person kills another in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury. This aspect of voluntary manslaughter is commonly referred to as "imperfect self-defense" or "unreasonable self-defense." In defining imminent peril, the court instructed the jury that imminent peril is a peril that is apparent to a reasonable person. The State also concedes that this definition of imminent peril was incorrect under California law.

In her direct appeal, state habeas petition, and subsequent federal habeas petition, McNeil argued that by limiting the jury's consideration of BWS evidence the trial court prevented the jury from considering constitutionally relevant evidence that supported her claim of perfect self-defense. McNeil also argued that the erroneous inclusion of a reasonableness standard in the definition of imminent peril prevented the jury from considering any claim of imperfect self-defense (and therefore from reaching a verdict of voluntary manslaughter) in violation of her constitutional right to present a defense and her due process right to a fair trial. The state court of appeal affirmed, concluding that, although the two instructions were erroneous, they were harmless. The district court also rejected McNeil's constitutional claims, ruling that the state court's decision was not an unreasonable application of clearly established constitutional law as determined by the Supreme Court.

Because the erroneous imperfect self-defense instruction wholly deprived McNeil of that defense by requiring that her fear be reasonable, McNeil was denied due process. The erroneous instruction prevented the jury from considering

McNeil's defense that she was guilty of nothing more than voluntary manslaughter, thus depriving McNeil of her constitutional right to present a defense. In light of the substantial evidence McNeil proffered in support of an imperfect self-defense claim, the state appellate court's conclusion that it "[was] not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter," *People v. McNeil*, No. D026047, slip op. at 9 (Cal. Ct. App. June 18, 1998), we conclude that the state court of appeal's analysis "resulted in a decision that was contrary to [and] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(l); *Williams v. Taylor*, 529 U.S. 362 (2000). Finally, because we conclude that the erroneous instruction rose to the level of constitutional error that had a substantial and injurious effect on the jury's verdict, we reverse the district court's denial of habeas relief.

I. FACTS AND PROCEDURAL HISTORY

A. BACKGROUND

We take the following recitation of background facts from the California Court of Appeal's decision, *People v. McNeil*, slip op. at 2-5:

> McNeil and Ray were both former [M]arines, bodybuilders and steroid users. Their relationship was replete with violent altercations. Evidence was introduced that McNeil had hit Ray and threw things at him, including dumbbells and a VCR that she threw out a second story window as Ray was walking below, and that Ray had hit, kicked and pushed McNeil leaving her with bruises and black eyes. Evidence was also introduced that McNeil had several violent

altercations with others, including women she suspected Ray was having affairs with, barroom bouncers, and the police.

On the night of the shooting, Ray said he was going out to the Price Club, which closed at 8:30 p.m., to get chicken for dinner. However, he did not return until 10:30 p.m., and had gone to a more expensive market. Ray had had several affairs during the course of the marriage, and McNeil suspected he had been seeing a girlfriend. McNeil criticized Ray for getting the more expensive chicken, which she could not afford, and asked what had taken him so long and if he had been with his girlfriend. She also told him he looked like "shit" and would not do well in an upcoming bodybuilding contest.

McNeil told police that Ray then slapped her, pushed her down on the floor and started choking her. McNeil squirmed away, ran into the bedroom and took her shotgun out of its case in the closet. She grabbed two shells, loaded one, pumped the gun, and then "went out and aimed it at [Ray]" and shot him. At the time, Ray was at the kitchen stove cooking chicken. McNeil stated that after Ray was shot, he doubled over and then came towards her, so she loaded the second round, pumped the gun again, and shot him a second time.

After that, McNeil gave the shotgun to a neighbor, and called 911. The 911 operator who took the call testified that she heard a male, who had been moaning, ask: "Why did you shoot me?" and McNeil respond: "I told you that I wasn't taking your shit anymore."

When police arrived, Ray was on his hands and knees about five feet inside the apartment and McNeil was standing at the kitchen sink. It looked like Ray's face had been blown off from the bridge of his nose down, and he was saying "Why?[,]" "Oh God," and "Help me." When paramedics arrived, Ray pointed to his stomach, and they saw his liver protruding through the skin. Ray was taken to the hospital and died that night. The shotgun wound to his midsection was the one that caused his death; the shotgun blast to his face caused massive damage to his lower jaw and face.

A police criminologist testified that the weapon used was a 12-gauge pump shotgun with a pistol grip, which was fired at Ray's midsection and then at his face from about six feet away. A crime scene reconstructionist opined that Ray's head was close to, and in line with, the sofa cushions when he was shot in the face, which would indicate that Ray was not upright when he was shot a second time.

Police discovered fingernail marks on McNeil's neck the night of the shooting and Ray's body was exhumed so that his fingernails could be examined. His fingernails were very short, and it was determined that his hands could not have caused the marks on McNeil's neck and further, that the marks were inconsistent with manual strangulation and could have been self-inflicted.

B. McNEIL'S DEFENSE

At trial, the State argued that McNeil committed murder when she killed Ray. McNeil's defense was that she killed Ray because she feared for her life. She presented this defense

through the testimony of an expert on BWS and through her own testimony regarding her history of abuse at the hands of Ray.

The defense expert testified that McNeil "would definitely qualify to be a battered woman"; indeed, the State's expert agreed that McNeil was a battered woman, but that because she was assertive and aggressive, she was "not the typical person with battered women's syndrome." However, McNeil's expert testified that in her experience battered women often develop assaultive behaviors as defense mechanisms.

The defense expert defined BWS for the jury and explained how BWS can make women hyper-sensitive to perceived threats of danger. The defense expert, who had conducted several clinical interviews with McNeil, testified that McNeil described regular beatings during her childhood and through her first marriage, including physical battery as well as death threats. McNeil provided detailed testimony of the physical harm that she suffered at the hands of Ray, which resulted in numerous injuries including five broken bones over the course of their marriage. The expert testified that McNeil described several choking incidents as well as psychological abuse by Ray. The expert testimony on BWS also lent support to McNeil's testimony that she shot Ray out of a genuine perception of imminent danger, explaining the cycle of episodic violence and dispelling myths about why battered women like McNeil don't leave their abusers.

McNeil argued that this evidence established that she acted in self-defense and that the state failed to meet its burden of demonstrating that she did not act out of a genuine and reasonable fear of imminent harm. As the jury was instructed, "The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not justifiable, or not committed in self-defense." Perfect self-defense requires a reasonable belief in the necessity to defend against imminent

peril to life or great bodily injury. *See* Cal. Penal Code § 197. As noted, McNeil also asserted that in the alternative, the evidence supported a claim of imperfect self-defense.[3/] Imperfect self-defense is not a complete defense to homicide under California law; however, if the slayer can show that she had an actual, honest belief that she was in imminent danger even if such a belief was unreasonable, this showing negates the malice required for a murder conviction and reduces the crime to manslaughter. *See In re Christian S.*, 7 Cal. 4th 768, 771 (Cal. 1994). For both perfect and imperfect self-defenses, in order to demonstrate an actual belief, McNeil had to show that her actions "were motivated by an actual (also referred to as 'genuine' or 'honest') belief or perception that (a) the defendant was in imminent danger of death or great bodily injury from an unlawful attack or threat by the victim and (b) the defendant's acts were necessary to prevent the injury." *People v. Aris*, 215 Cal. App. 3d 1178, 1186 (Cal. Ct. App. 1989), *overruled in part by Humphrey*, 13 Cal. 4th at 1086.

Prior to trial, the State filed a motion to preclude the jury from considering McNeil's BWS evidence in determining whether McNeil had a reasonable belief in the need for self-

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3. The California Supreme Court has explained imperfect self-defense as follows:

> Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually* but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter.

In re Christian S., 7 Cal. 4th 768, 771 (Cal. 1994).

defense. Although McNeil argued that the expert's testimony would explain how the effects of BWS can fundamentally alter how a reasonable person perceives imminent harm, the trial court granted the motion. Thus, as a result of the court's pretrial ruling, the court allowed McNeil to present evidence that she suffered from BWS, but the jury was instructed that it could not consider BWS when evaluating the reasonableness of her actions in its evaluation of McNeil's perfect self-defense defense. This limitation on the use of BWS evidence was correct under then-existing California law. However, after McNeil's conviction, the California Supreme Court held that evidence of Battered Women's Syndrome is relevant to the reasonableness as well as the existence of a defendant's actual belief in the need to act in self-defense. *See People v. Humphrey*, 13 Cal. 4th at 1088-89. In light of the *Humphrey* decision, the State has acknowledged that the limiting instruction was erroneous.

In its instructions on imperfect self-defense, the trial court erroneously instructed the jury that McNeil's perception of imminent peril to her life was to be assessed from the perspective of a reasonable person. By imposing a reasonableness requirement the trial court erred, as conceded by the State and recognized by the state appellate court, *see People v. McNeil*, slip op. at 9. Indeed, the insertion of the reasonableness standard essentially made the imperfect self-defense instruction the equivalent of the perfect self-defense instruction.

C. THE VERDICT, DIRECT APPEAL, AND HABEAS PROCEEDINGS

The jury ultimately convicted McNeil of second degree murder with the personal use of a firearm; the court sentenced her to 15 years to life in prison, plus a consecutive 4-year term for the firearm enhancement. *People v. McNeil*, slip op. at 1. McNeil appealed on a number of grounds, including that the

erroneous limiting instruction prevented the jury from considering constitutionally relevant evidence in support of her perfect-self defense claim and that the erroneous instruction on imminent peril prevented her from presenting a meaningful imperfect-self defense claim. The California Court of Appeal did not address the merits of these claims; rather, it concluded that any error was harmless. The court affirmed the judgment on direct appeal and denied a companion petition for a writ of habeas corpus. The California Supreme Court subsequently denied a petition for review, and McNeil filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the district court. The district court dismissed the petition, and subsequently denied a certificate of appealability (COA). We granted a COA on the following two issues:

> (1) whether appellant's federal constitutional rights were violated when the trial court incorrectly instructed the jury that evidence of Battered Woman Syndrome could not be considered for the reasonableness of appellant's belief in her need for self-defense; and (2) whether appellant's federal constitutional rights were violated when the trial court incorrectly instructed the jury on "imminent peril."

II. STANDARD OF REVIEW

We review de novo a district court's denial of a petition for a writ of habeas corpus. *Avila v. Galaza*, 297 F.3d 911, 914 n.1 (9th Cir. 2002). Because McNeil filed her habeas petition after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), applies. Habeas relief may be granted if a state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(l). When applying

AEDPA and reviewing whether a state court decision is contrary to federal law, "we look to the state's last reasoned decision – in this case [the California Court of Appeal's decision] – as the basis for its judgment." *Avila*, 297 F.3d at 918. A state court decision is "contrary to" federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion when presented with a case involving materially indistinguishable facts. *Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002). Furthermore, we must heed the Supreme Court's admonition that "[u]nder § 2254(d)(l)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Lockyer v. Andrade*, 123 S. Ct. 1166, 1175 (2003) (quoting *Williams v. Taylor*, 529 U.S. at 411). Our review is significantly circumscribed: "AEDPA limits our review to the state court's *decision*, which is ordinarily entitled to deference." *Greene v. Lambert*, 288 F.3d 1081, 1088 (9th Cir. 2002).

When asserting a claim of instructional error, the Supreme Court has held that a petitioner must show that the instructional error "so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (internal citations omitted). The Supreme Court has long held that when analyzing instructional error and its effect on the validity of a conviction, "we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). We must also apply the Supreme Court's prejudice standard for evaluating trial error on collateral review as set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993). *See Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000). In *Brecht*, the Supreme Court held that a federal court may not grant habeas relief for trial errors without a showing of actual

prejudice; error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

III. VIOLATION OF McNEIL'S CONSTITUTIONAL RIGHTS

We conclude that when considered in the context of the overall charge to the jury, the erroneous instruction on imperfect self-defense deprived McNeil of her constitutional right to an instruction on one of her two defense theories, thereby violating her right to present a defense and her right to a fair trial. Because we conclude that the erroneous imperfect self-defense instruction violated McNeil's constitutional right to present a defense and had a substantial and injurious affect on the jury's verdict, we limit our analysis to the imperfect self-defense instruction and do not reach the other instructional error.

The State, citing *Estelle*, 502 U.S. at 72, argues that the instructional errors at stake here were merely violations of state law that do not rise to the level of a federal constitutional violation. Although the State is correct that a state law violation alone does not warrant federal habeas relief, here, the state law violation implicated federal due process protections because the error so infected and permeated the trial that McNeil was prevented from presenting a defense. The erroneous instruction prevented the jury from considering McNeil's imperfect self-defense, thereby depriving McNeil of her Fifth Amendment due process right to a fair trial and her Sixth Amendment right to present a defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'")). Thus, the state court of appeal's adjudication of McNeil's

constitutional claims was contrary to clearly established Supreme Court law.

Further, although the state court recognized the Supreme Court's admonition that when reviewing for instructional error, the charge to the jury must be considered as a whole, the state court unreasonably applied this principle by presuming that the jury simply ignored some instructions and followed others. Indeed, the court's interpretation was contrary to the clearly established Supreme Court law under which we presume that jurors follow the trial court's instructions. Although McNeil argued that the jury was prevented from considering her imperfect self defense claim, without even considering the evidence that was effectively excluded or evaluating the strength of her imperfect self-defense claim, the state appellate court concluded that the error was harmless because the jury found McNeil guilty of second degree murder. Because the state appellate court concluded that the trial court's instructional error was harmless, it failed to reach the merits of McNeil's due process constitutional claims that the instructional errors precluded her from presenting a meaningful defense and denied her a fair trial.

In light of the nature of the evidence, McNeil's defense, and the way in which the instructional error eliminated imperfect self-defense from the jury's consideration, we hold that the erroneous imperfect self-defense instruction so infected the trial as to violate McNeil's right to due process.

A. THE ERRONEOUS INSTRUCTION ON IMPERFECT SELF-DEFENSE

The erroneous imperfect self-defense instruction read as follows:

> A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.
>
> An "imminent peril" is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person.

The state appellate court recognized that the inclusion of "as a reasonable person" at the end of this instruction was erroneous.[4] *See In re Christian S.*, 7 Cal. 4th at 771. However, the court concluded that when all of the jury instructions on voluntary manslaughter were considered as a whole, "it [wa]s not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter." *People v. McNeil*, slip op. at 9. The state court's conclusion was objectively unreasonable and directly contrary to the trial record.

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4. California Jury Instruction - Criminal ("CALJIC") No. 5.17 is the model jury instruction on "Actual but unreasonable belief in necessity to defend - Manslaughter," and provides the same instruction as given by the judge in this case *but excludes* the last clause "or must so appear at the time to the slayer as a reasonable person." Indeed, by including a reasonableness requirement in the definition of imperfect self-defense, the court essentially re-stated the perfect self-defense instruction and removed any consideration of voluntary manslaughter premised on imperfect self-defense from the jury's consideration.

[1] As the instruction reflects, the jury was instructed that imperfect self-defense required an actual belief in the need to defend against an imminent peril and that an imminent peril was peril that was apparent to a reasonable person, depriving McNeil of her due process right to present a complete defense. Indeed, by eliminating imperfect self-defense (and the corresponding voluntary manslaughter verdict) from the jury's consideration, the trial court also deprived McNeil of her due process right to meaningfully present her version of the facts. Under McNeil's version, even if the jury concluded that her perception of imminent peril was unreasonable, McNeil nonetheless had a genuine perception of imminent harm on the night that she shot Ray and was therefore, at most, guilty of voluntary manslaughter. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (describing the rights guaranteed under the due process clause, including, *inter alia*, the right to present a defense and the right "to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"). Although a person who had not experienced the effects of long term battering might not have perceived the same imminent peril from the events confronting McNeil at the time of the killing, the BWS evidence provided an explanation of how a victim of the long term abuse may have an increased sensitivity to danger and peril and therefore could perceive a genuine threat of harm where another person might not.

[2] The erroneous inclusion of a reasonable person standard in the definition of imminent peril eliminated one of McNeil's two possible defenses. Under the facts of this case, preventing the jury from considering McNeil's imperfect self-defense claim constituted a denial of her right to present a complete defense and her right to a fair trial. McNeil provided more than enough BWS evidence for a reasonable jury to conclude that she had a genuine perception of imminent harm, even if it concluded that that perception was unreasonable. *See Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is

entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. A parallel rule has been applied in the context of a lesser included offense instruction." (citations omitted)).

[3] The trial court's failure to instruct the jury on the defendant's theory of defense violates the Due Process clause. In *Bradley v. Duncan*, we explained that under AEDPA the failure to instruct a jury on entrapment violated the defendant's due process right to present a full defense, explaining that under clearly established Supreme Court law, "the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense. This is so because the right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." 315 F.3d 1091, 1099 (9th Cir. 2002) (citations omitted).

We reach this conclusion only after considering the charge to the jury as a whole. The only time that the trial judge actually defined imminent peril for the jury was in the erroneous instruction on imperfect self-defense instruction. Thus, during deliberations, the only definition of imminent peril available to the jury was one that imposed a reasonableness requirement.[5]

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5. Although the court used the words "imminent harm" when explaining perfect self-defense, the court did not define the term "imminent harm." Notably, the court referred to "imminent harm" in the context of the perfect self-defense instruction, a context which required a reasonableness standard. That is, when explaining that in order for homicide to be justifiable and not unlawful, the court instructed that the person must "honestly and *reasonably* believe[] that the individual killed intended to commit a forcible and atrocious crime and that there was imminent danger of such crime being

McNeil's entire case focused on a claim that she had a genuine perception of imminent harm – she argued that she had a claim of reasonable self-defense or in the alternative a claim of unreasonable self-defense. Just as in *DePetris v. Kuykendall*, where the petitioner claimed imperfect self-defense,[6] McNeil's "sole defense was that she killed her husband in an honest belief that she needed to do so to save her life. The success of the defense depended almost entirely on the jury's believing petitioner's testimony about her state of mind at the time of the shooting." 239 F.3d at 1062.

[4] The evidence presented here would support a perfect self-defense claim or an imperfect self-defense claim. For example, Dr. Kaser-Boyd opined that, as is common in women with BWS, McNeil was "hyper-vigilant" to danger and threats after Ray choked her the first time, "and that she responded almost automatically to her perception of danger." Thus, the erroneous definition of imminent peril likely prevented the jury from considering in a meaningful way how Battered Women's

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accomplished." The court's instruction further linked imminent harm to the concept of reasonableness when it further instructed: "[the] bare fear of death or great bodily harm is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as to excite the fears of a *reasonable* person placed in a similar position . . . The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a *reasonable* person . . ." (emphasis added).

6. In *DePetris*, the petitioner presented BWS evidence and we held that the erroneous exclusion of evidence that supported the subjective aspect of claimed imperfect self-defense violated the petitioner's right to a fair trial; we therefore reversed the district court's denial of habeas relief. 239 F.3d 1057, 1059 (9th Cir. 2001).

Syndrome would have affected McNeil's perception of imminent harm whereas a person who had not suffered years of abuse might not perceive imminent harm:

> The relevance to the defendant's actual perception lies in the opinion's explanation of how such a perception would reasonably follow from the defendant's experience as a battered woman. This relates to the prosecutions's argument that such a perception of imminent danger makes no sense when the victim is asleep and a way of escape open and, therefore, she did not actually have that perception.

People v. Aris, 215 Cal. App. 3d at 1197; *see also Humphrey*, 13 Cal. 4th at 1088-89.

[5] In sum, the instructional error here prevented McNeil from presenting a meaningful defense and had such a prejudicial effect on the verdict that it fits within the narrow category of errors that violate fundamental fairness. *McGuire*, 502 U.S. at 72. As the Supreme Court explained in *Albright v. Oliver*, the due process requirement is one of "safeguarding the liberty of the citizen against deprivation through the action of the State." 510 U.S. 266, 298 (1994). Here, the jury was prevented from considering McNeil's theory of the defense that she had a genuine but unreasonable perception of imminent harm and if she was guilty of any offense it was voluntary manslaughter, not murder.

B. THE APPLICATION OF AEDPA TO THE STATE APPELLATE COURT'S DECISION

As explained above, under AEDPA, a federal court may grant a petition for writ of habeas corpus only if the state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Here, the state appellate court concluded that the erroneous instructions which, *inter alia*, eliminated imperfect self defense, were harmless and therefore did not address whether the errors interfered with McNeil's constitutional right to present a meaningful defense. It defies logic to point to the jury's second degree murder guilty verdict as evidence that the erroneous instructions preventing McNeil from presenting a defense were harmless. By preventing the jury from considering McNeil's critical claim of imperfect self-defense, McNeil was deprived of her right to "due process . . . a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

To the extent that the state appellate court articulated its reasoning for concluding that any alleged instructional error was harmless, the court correctly identified the clearly established Supreme Court law that requires that instructional errors be considered in the context of the entire charge to the jury. *See Estelle*, 502 U.S. at 72. However, the state court unreasonably applied this constitutional principle. In rejecting McNeil's constitutional argument, the court selected several of the jury instructions from the charge to the jury on voluntary manslaughter, ignored other instructions, and looked to the jury's guilty verdict on second degree murder to conclude that the jury did not believe that McNeil had a perception (reasonable or unreasonable) of imminent peril. In violation of clearly established Supreme Court law, the state appellate court presumed that the jury ignored the clear (but erroneous) imperfect self-defense instruction.

[6] When the state appellate court neglected to consider the ways in which the erroneous imperfect self-defense argument amounted to constitutional error, in effect presuming that the jurors simply ignored one of the instructions, its decision resulted in an unreasonable application of clearly established federal law as determined by the Supreme Court. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp*, 414 U.S. at 146-47. The Supreme Court has held that it "presumes that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985). We conclude that here, where the state court completely ignored unchallenged and uncorrected instructions to the jury, the state court's "application of clearly established law [was] objectively unreasonable." *Andrade*, 123 S. Ct. at 1174.

Furthermore, the state court's reliance on the prosecutor's argument to support its conclusion that the verdict was not prejudiced by the erroneous instructions contradicts clearly established Supreme Court law. We have repeatedly recognized (and the Supreme court has long held) that instructions from a judge carry more weight than instructions from counsel, *see, e.g., Boyde*, 494 U.S. at 384, and that jurors are presumed to follow the jury instructions they are given, *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (referring to "the almost invariable assumption of the law that jurors follow their instructions" (internal citation omitted)). In *Ho v. Carey*, 332 F.3d 587 (9th Cir. 2003), we recently rejected the state court's conclusion that "the arguments of counsel clarified for the jury that it was required to convict Ho of manslaughter if it accepted his argument of self-defense" after the court had given an erroneous instruction on manslaughter. *Id.* at 594. Explaining that we "must presume that a jury follows the trial court's instructions," we stated that "[t]he arguments of counsel . . . could not serve to

remedy the court's erroneous . . . instruction." *Id.* As the Supreme Court clearly explained in *Boyde*,

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, [the Supreme Court has] often recognized, are viewed as definitive and binding statements of the law.

Boyde, 494 U.S. at 384.

[7] Thus, despite the prosecutor's argument that if the jury determined that McNeil actually believed in the necessity for self-defense she would be guilty of manslaughter and not murder, the jury, presumed to follow the instructions of the judge, likely applied the reasonableness requirement to its assessment of imminent peril and therefore could not find McNeil not guilty of murder unless it found her perception of peril to be a reasonable one. Under the facts of this case, McNeil's claim of imperfect self-defense was just as critical as her claim of perfect self-defense. The instructional error prevented the jury from considering this defense in a meaningful way – even if it did conclude that she genuinely perceived a threat of imminent harm, it could not find her guilty of voluntary manslaughter unless it believed that this perception was a reasonable one. The state court's erroneous decision with respect to imperfect self-defense was contrary to and involved an unreasonable application of clearly established Supreme Court law.

IV. THE SUBSTANTIAL AND INJURIOUS EFFECT OF THE CONSTITUTIONAL ERROR

[8] Next, we must determine whether the instructional error in the context of the charge to the jury as a whole "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (internal citation omitted). The powerful evidence presented in support of McNeil's claim that she had a real, if unreasonable, belief in imminent peril and the seemingly contradictory jury verdicts convince us that the error had a prejudicial effect on the jury's verdict. The error here thus surpasses the Supreme Court's threshold for finding prejudicial error; the Supreme Court has held that in the "special circumstance in which record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict," the writ should issue. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). According to the Court, the "uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict." *Id.* Thus even if we were left in grave doubt as to the impact of this error on the jury's deliberation, we would conclude that McNeil is entitled to habeas relief under 28 U.S.C. § 2254. The import of the imperfect self-defense claim and its close relationship with the only other proffered defense, perfect self-defense, and the evidence presented in support of both claims, do not leave us in doubt as to the impact of this error on the jury's verdict.

In *Mancuso v. Olivarez*, we reiterated that "if one is left in grave doubt [about the harmfulness of the error], the conviction cannot stand." 292 F.3d 939, 950 (9th Cir. 2002) (internal citation omitted). Just as in *Belmontes v. Woodford*, here, too, we need not decide who (if anyone) bears the burden of showing prejudice: "No matter who has the burden, or if there is no burden at all, we are convinced that the instructional error in this case, which prevented the jury from considering and giving

effect to [McNeil's] most important [BWS] evidence, had a substantial and injurious effect on the jury's verdict." 335 F.3d 1024, 1070 (9th Cir. 2003).

The BWS evidence focused on why McNeil, a woman who suffered the effects of BWS, would perceive a threat (reasonably or otherwise) under circumstances in which a person without BWS might not perceive a threat of imminent harm. In the absence of the instructional error, the jury would have been able to reach a verdict of manslaughter as opposed to murder if it accepted this evidence as it related to the genuine nature of McNeil's perception of imminent harm. Under the erroneous instruction, if the jury did not find such a perception reasonable, it could only convict her of murder.

The BWS evidence and testimony provided ample support for McNeil's imperfect self-defense defense. Dr. Kaser-Boyd, who conducted various interviews with McNeil, directly addressed the issue of the effect of BWS on McNeil's perception of fear: "People who have been battered tend to be afraid of other people, too. So if you have been beaten up and hurt by one person and someone gets aggressive with you physically, which is what she has described, it is not surprising that she should feel fear."

The BWS evidence detailing McNeil's history of abuse at the hands of Ray and her former husband, including the evidence of the impact of the earlier chokings and sexual assaults, as well as her belief that a woman she knew was killed by her husband when he choked her and broke her neck, provided sufficient evidence for a reasonable jury to accept McNeil's imperfect self-defense defense.

In sum, McNeil demonstrated that the instructional errors "had a substantial and injurious effect . . . in determining the jury's verdict." Brecht, 507 U.S. at 623.

V. CONCLUSION

The state appellate court's decision with respect to the instructional error in the imperfect self-defense instruction was contrary to the clearly established Supreme Court law that due process requires that a defendant have a fair opportunity to defend against the state's charges and that a defendant have a meaningful opportunity right to present a complete defense. *See Chambers*, 410 U.S. at 294 and *Trombetta*, 467 U.S. at 485. The state appellate court's assumption that the jury did not follow the trial court's charge to the jury contradicts clearly established Supreme Court law that presumes that jurors follow the instructions given to them by the court. *See Francis*, 471 U.S. at 324 n.9. The erroneous instruction on imperfect self-defense completely eliminated one of McNeil's principal theories of defense from the jury's consideration – the defense that she had a fear of imminent harm. Even if the jury believed that McNeil had an actual but unreasonable fear of imminent peril, the jury was precluded from finding her guilty of voluntary manslaughter.

The erroneous instruction had a substantial and injurious effect on the jury's verdict. McNeil was deprived of her constitutional right to present a meaningful defense and thus her due process right to a fair trial as protected under the Fifth and Sixth Amendments. The state court's failure to consider the instructions as a whole resulted in an objectively unreasonable decision that failed to recognize the impact of this instructional error.

[9] Accordingly, we reverse the district court's judgment and remand with instructions to grant the petition for writ of habeas corpus and to issue a writ containing conditions the district court finds to be appropriate.

REVERSED and REMANDED

APPENDIX B

APPENDIX B

[Filed June 18, 1998]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,	) D026047
	)
Plaintiff and Respondent,	) (Super. Ct. No.
	) SCN018509)
v.	)
	)
SALLY MARIE McNEIL,	)
	)
Defendant and Appellant.	)
	)
In re SALLY MARIE McNEIL	) D030509
	)
on	)
	)
Habeas Corpus.	)
	)

APPEAL from a judgment of the Superior Court of San Diego County, Laura P. Hammes, Judge, and petition for writ of habeas corpus. Judgment affirmed and petition denied.

Sally Marie McNeil killed her husband, Ray McNeil, by shooting him with a shotgun. A jury convicted her of second

degree murder with the personal use of a firearm, and she was sentenced to 15 years to life in prison, plus a consecutive 4-year term for the firearm enhancement.

McNeil appeals, contending the court erred by (1) refusing to instruct the jury on malice; (2) misinstructing the jury on imperfect self-defense; (3) instructing the jury that evidence that she suffered from Battered Women's Syndrome could not be used in determining the reasonableness requirement of self-defense; (4) denying her request to instruct on the lesser included offense of involuntary manslaughter; and (5) refusing to give her proposed pinpoint instruction.

We conclude that (1) although the trial court did not use the term "malice" in its instructions, it properly instructed the jury regarding this element and on the offenses of murder and manslaughter; (2) the instructions viewed as a whole properly informed the jury regarding the imperfect self-defense component of voluntary manslaughter; (3) the court committed harmless error in instructing the jury that it could not consider evidence regarding the Battered Women's Syndrome in determining the reasonableness of any belief McNeil had in the need to act in self-defense; and (4) the court did not err in refusing to instruct on involuntary manslaughter or in refusing to give McNeil's proposed pinpoint instruction. Accordingly, we affirm the judgment.

FACTS

McNeil and Ray were both former marines, bodybuilders and steroid users. Their relationship was replete with violent altercations. Evidence was introduced that McNeil had hit Ray and threw things at him, including dumbbells and a VCR that she threw out a second story window as Ray was walking below, and that Ray had hit, kicked and pushed McNeil leaving her with bruises and black eyes. Evidence was also introduced that

McNeil had several violent altercations with others, including women she suspected Ray was having affairs with, barroom bouncers, and the police.

On the night of the shooting, Ray said he was going out to the Price Club, which closed at 8:30 p.m., to get chicken for dinner. However, he did not return until 10:30 p.m., and had gone to a more expensive market. Ray had had several affairs during the course of the marriage, and McNeil suspected he had been seeing a girlfriend. McNeil criticized Ray for getting the more expensive chicken, which she could not afford, and asked what had taken him so long and if he had been with his girlfriend. She also told him he looked like "shit" and would not do well in an upcoming bodybuilding contest.

McNeil told police that Ray then slapped her, pushed her down on the floor and started choking her. McNeil squirmed away, ran into the bedroom and took her shotgun out of its case in the closet. She grabbed two shells, loaded one, pumped the gun, and then "went out and aimed it at [Ray]" and shot him. At the time, Ray was at the kitchen stove cooking chicken. McNeil stated that after Ray was shot, he doubled over and then came towards her, so she loaded the second round, pumped the gun again, and shot him a second time.

After that, McNeil gave the shotgun to a neighbor, and called 911. The 911 operator who took the call testified that she heard a male, who had been moaning, ask: "Why did you shoot me?" and McNeil respond: "I told you that I wasn't taking your shit anymore."

When police arrived, Ray was on his hands and knees about five feet inside the apartment and McNeil was standing at the kitchen sink. It looked like Ray's face had been blown off from the bridge of his nose down, and he was saying "Why?", "Oh God," and "Help me." When paramedics arrived, Ray pointed to

his stomach, and they saw his liver protruding through the skin. Ray was taken to the hospital and died that night. The shotgun wound to his midsection was the one that caused his death; the shotgun blast to his face caused massive damage to his lower jaw and face.

A police criminologist testified that the weapon used was a 12-gauge pump shotgun with a pistol grip, which was fired at Ray's midsection and then at his face from about six feet away. A crime scene reconstructionist opined that Ray's head was close to, and in line with, the sofa cushions when he was shot in the face, which would indicate that Ray was not upright when he was shot a second time.

Police discovered fingernail marks on McNeil's neck the night of the shooting and Ray's body was exhumed so that his fingernails could be examined. His fingernails were very short, and it was determined that his hands could not have caused the marks on McNeil's neck and further, that the marks were inconsistent with manual strangulation and could have been self-inflicted.

DISCUSSION

THE MODIFIED INSTRUCTIONS ADEQUATELY ADVISED THE JURY ON THE ELEMENTS OF SECOND DEGREE MURDER AND VOLUNTARY MANSLAUGHTER

The trial court modified the standard CALJIC instructions on murder and voluntary manslaughter by deleting all references to the term "malice." McNeil contends this was reversible error. We disagree.

Jury Instructions Regarding Murder

The court defined homicide as any killing of a human being, whether lawful or unlawful, and instructed that homicide includes murder and manslaughter, which are unlawful, and justifiable homicides, which are lawful. In lieu of CALJIC No. 8.10, which defines the elements of murder using the term "malice aforethought" the court stated that "Murder is of the first or second degree." It instructed on first degree murder using the standard version of CALJIC No. 8.20. The court then defined second degree murder in two ways. For the so-called "express malice" form, it used a modified version of CALJIC No. 8.30 (unpremeditated murder of the second degree), which defined second degree murder as "the unlawful killing of a human being when there is *manifested an intention unlawfully to kill* a human being but the evidence is insufficient to establish deliberation and premeditation." (Italics added.) For the so-called "implied malice" form, it used the standard version of CALJIC No. 8.31 (second degree murder -- killing resulting from unlawful act dangerous to life). Finally, because the term malice aforethought was removed from the instructions, the court did not give CALJIC No. 8.11, which defines malice aforethought.

McNeil contends that by deleting the term malice aforethought from the murder instructions, the court removed the element of malice from the crime of murder. Not so. Even though the court did not use the specific term "malice," it properly defined this element as requiring proof beyond a reasonable doubt that McNeil "manifested an intention unlawfully to kill." (*People* v. *Swain* (1996) 12 Cal.4th 593, 601; see also *People* v. *Stanley* (1995) 10 Cal.4th 764, 796; *In re Christian S.* (1994) 7 Cal.4th 768, 778; *People* v. *Saille* (1991) 54 Cal.3d 1103, 1114-1115.) Accordingly, the element of malice was not removed from the jury's consideration in determining if McNeil was guilty of murder.

Jury Instructions Regarding Manslaughter

The court instructed the jury that "voluntary manslaughter is a lesser crime to murder," and defined voluntary manslaughter using a modified version of CALJIC No. 8.40 which omitted references to malice aforethought and the absence thereof:

> "Every person who unlawfully kills another human being with an intent to kill, is guilty of voluntary manslaughter in violation of [section] 192 [subdivision] (a) of the Penal Code.
>
> "The specific intent for voluntary manslaughter, as opposed to murder, must arise upon one of [the] following circumstances:
>
> "One, an unprovoked quarrel or other unreasonable provocation. That is, the person committing the killing must be acting intentionally, but in the heat of passion aroused by circumstances which would provoke an ordinarily reasonable person of average disposition to act rashly without deliberation and reflection.
>
> "Or the specific intent for voluntary manslaughter, as opposed to murder, must arise upon:
>
> "Two, an honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. That would be imperfect self-defense."

The court then distinguished murder from voluntary manslaughter using a slightly modified version of CALJIC No. 8.50. The standard version of CALJIC No. 8.50 states that the distinction between murder and manslaughter is that while both involve an intent to kill, murder requires malice, and

manslaughter does not -- and when the slayer acts in heat of passion or sudden quarrel amounting to adequate provocation or in imperfect self-defense, malice is absent, even though the intent to kill is present. The trial court's modified version omitted the references to murder requiring malice and manslaughter not requiring malice, instead stating:

> "When the act causing the death, though unlawful; is done in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation or in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury the offense is manslaughter. In such case, even if the intent to kill exists, the law is that the killing is manslaughter and not murder.
>
> "To establish that a killing is murder [and] not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or to great bodily injury."

The court further defined imperfect self-defense as follows:

> "A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.

> "An 'imminent' peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person."

McNeil contends her conviction for second degree murder must be reversed because the court "completely eliminate[d] the possibility of a conviction of voluntary manslaughter by taking away the element of malice from the manslaughter instructions." We disagree. Although the court omitted the term malice from its manslaughter instructions, it properly instructed the jury that to reduce an intentional killing from murder to manslaughter, "[t]he specific intent for voluntary manslaughter, as opposed to murder, must arise upon" heat of passion, sudden adequate or imperfect self-defense. (See *People* v. *Barton* (1995) 12 Cal.4th 186, 199.) Under these circumstances, malice is not present as a matter of law, and therefore, the court correctly advised the jury of the circumstances under which an intentional unlawful killing will be deemed voluntary manslaughter rather than murder. (See *People* v. *Bobo* (1990) 229 Cal.App.3d 1417, 1439-1441.)

McNeil also contends her conviction must be reversed because in defining "imminent peril" for the purposes of imperfect self-defense, the court used the phrase "or must so appear at the time to the slayer *as a reasonable person.*" (Italics added.) We agree that the term "reasonable person" should not have been used in the instruction (see *People* v. *Flannel* (1979) 25 Cal.3d 668, 679), and indeed, it appears from the record that it was included in the standard CALJIC No. 5.17 by mistake.

However, reversal is not required because "[e]rror cannot be predicated upon an isolated phrase, sentence or excerpt from the instructions since the correctness of an instruction is to be determined in its relation to the other instructions and in light of the instructions as a whole." (*People* v. *Wingo* (1973) 34 Cal.App. 3d 974, 979.) Here, when all of the jury instructions on

voluntary manslaughter and imperfect self-defense, are considered in their entirety, it is not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter. (See *People* v. *Kelly* (1992) 1 Cal.4th 495, 525; *People* v. *Gomez* (1986) 183 Cal.App.3d 986, 992-993.) On the contrary, these instructions repeatedly informed the jury that if the defendant had an honest (or actual) but *unreasonable* belief in the need to act in self-defense, then the offense would be manslaughter and the defendant could not be convicted of murder. (See *People* v. *Flannel, supra*, 25 Cal.3d at p. 679.) Furthermore, in arguing to the jury, the prosecutor set forth the appropriate standard, stating "[i]f you believe it is an imperfect self-defense, that she actually believed but that a reasonable person would not believe in the necessity for self-defense, that lessens the crime to what is called, 'voluntary manslaughter. '" (See *People* v. *Kelly, supra*, 1 Cal.4th at p. 526.)

THE COURT COMMITTED HARMLESS ERROR IN INSTRUCTING THE JURY THAT EVIDENCE THAT McNEIL SUFFERED FROM BATTERED WOMEN'S SYNDROME COULD NOT BE USED FOR DETERMINING THE REASONABLENESS OF ANY BELIEF SHE HAD IN THE NEED TO ACT IN SELF-DEFENSE

The court instructed the jury that the killing of another in self-defense is justifiable and not unlawful when the person actually and reasonably believes there is imminent danger that the other will kill her or cause great bodily injury and it is necessary to use deadly force to defend herself. As set forth above, the court also explained that "[a] person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, *but is not guilty of murder*." (Italics added.) Finally, it instructed that evidence that McNeil suffered

from Battered Women's Syndrome at the time of the killing could be used in determining whether she had an actual belief in the need to defend herself, but could not be used in considering whether that belief was reasonable.

This last instruction was erroneous because after the date of the trial, the Supreme Court held that evidence of Battered Women's Syndrome is relevant to the reasonableness, as well as the subjective existence of a defendant's belief in the need to act in self-defense. (*People* v. *Humphrey* (1996) 13 Cal. 4th 1073, 1088-1089.) However, this error was harmless because the jury's verdict of murder demonstrates that it determined that McNeil did not have an actual belief in the need to act in self-defense. (See *id.* at p. 1089.) The jury was specifically instructed that if McNeil *had* an actual belief in the need to act in self-defense she could not be guilty of murder. Accordingly, whether McNeil *reasonably* believed in the need to act in self-defense became a moot issue.

THE EVIDENCE DID NOT SUPPORT AN INSTRUCTION ON INVOLUNTARY MANSLAUGHTER

McNeil contends the judgment must be reversed because the court refused to instruct on the lesser included offense of involuntary manslaughter. We disagree because the evidence did not support such an instruction.[1/]

---

1. The Attorney General contends that McNeil's attorney withdrew his request for an instruction on involuntary manslaughter; McNeil has vigorously disagreed with this characterization of the facts in her reply brief and in a separate petition of writ for habeas corpus. This issue is rendered moot, however, by our conclusion that the evidence did not warrant an instruction on involuntary manslaughter.

McNeil argues that a lesser included offense instruction on involuntary manslaughter should have been given because there was evidence that she merely acted "without due caution and circumspection" as opposed to with. the intent to kill. In support, she cites testimony by a psychologist that McNeil had said she only intended to scare Ray when she shot him and thought she could "spray" him without the impact being lethal, as well as the psychologist's opinion that McNeil was hyper-vigilant regarding danger once it started and responded almost automatically to her perception of danger.

Nevertheless, in order for McNeil to be entitled to a involuntary manslaughter instruction, whether requested or sua sponte, there had to be "sufficient evidence for a reasonable juror to find [she] acted without consciously realizing the risk to [Ray's] life." (*People* v. *Evers* (1992) 10 Cal.App.4th 588, 596.) Such evidence is not present in this case. On the contrary, the evidence was that McNeil, a former marine and the owner of a 12 gauge, pistol-grip, pump-action shotgun, loaded this weapon and intentionally shot Ray from about six feet away as he was frying chicken. After she hit Ray in the midsection and he doubled over, McNeil reloaded and shot him in the face. The only inference the jury could draw from the evidence presented was that McNeil knew and understood the risk her actions posed to Ray's life. (See *id.* at pp. 596-597.) Accordingly, the court did not err in failing to instruct on involuntary manslaughter.

THE COURT DID NOT ERR IN REFUSING TO GIVE McNEIL'S PROPOSED PINPOINT INSTRUCTION

McNeil requested that the trial court give the following instruction "pinpointing" her theory of defense:

> "In judging SALLY McNEIL's actions, you should attempt to place yourself in her position at the time of the incident. You should therefore consider her past

> and present knowledge, her beliefs, the relative size and strength of the participants, RAY McNEIL's words and actions prior to the shooting, the history of their relationship, and all other factors bearing on the reasonableness of her actions and her apprehensions at the time as they appeared to her."

The court declined to give this instruction because it was argumentative and the general propositions were adequately covered through other jury instructions. This ruling was correct. (*People* v. *Wright* (1988) 45 Cal.3d 1126, 1135.) First, the instruction presupposed that McNeil had "apprehensions" at the time of the killing, which was an issue for the jury to determine. It also directed the jury's attention to Ray's words or actions prior to the shooting, implying that he had in fact done or said something to put McNeil in fear -- which was another issue of fact for the jury to determine based solely on the evidence. (See *ibid.*)

Furthermore, the point of law contained in the pinpoint instruction was adequately covered in the following instruction which the court gave on self-defense:

> "With respect to self-defense, you should consider the following:
>
> "In determining what the defendant personally believed at the time of the killing, and in judging what a reasonable person [would] have believed at the time of the killing, you should consider the circumstances apparent at the time, as well the relevant circumstances known to the defendant which may have occurred over a period of time before the killing.
>
> "One who has been previously assaulted or threatened by another is justified in acting more quickly and

> taking harsher measures for protection in the event of a new assault, either actual or threatened than would a person who had not received prior assaults or threats."

Accordingly, there was no error in refusing to give McNeil's pinpoint instruction.

DISPOSITION

The judgment is affirmed, and the petition for writ of habeas corpus is denied.

_____

McINTYRE, J.

WE CONCUR:

_____

MCDONALD, Acting P. J.

_____

O'NEIL, J.*

*Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX C

APPENDIX C

[Filed December 27, 2000]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALLY MARIE McNEIL,	)Civil No. 99-1490-JM
	) (CGA)
Petitioner,	)
	) REPORT AND
v.	) RECOMMENDATION
	) RE DENIAL OF PETITION
RAYMOND L. MIDDLETON,	) FOR WRIT OF HABEAS
Warden,	) CORPUS
	)
Respondent.	)
	)

This Report and Recommendation is submitted to United States District Judge Jeffrey T. Miller, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United States District Court for the Southern District of California.

I.

PROCEEDINGS

On July 19, 1999, Sally Marie McNeil (hereinafter "Petitioner") a California state prisoner, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. On September 15, 1999, Respondent filed a Motion to Dismiss the Petition on the basis that Petitioner had

failed to exhaust her state court remedies for all of the claims presented in the Petition.

By Order filed January 3, 2000, the Court found that the first subpart of Petitioner's third claim was unexhausted, and that the remainder of the claims presented in the Petition were exhausted. Petitioner was apprised of the following options: 1) voluntarily dismissing her Petition in order to exhaust the unexhausted claim in state court; 2) filing a supplemental memorandum of points and authorities in an attempt to demonstrate that she had in fact exhausted the first subpart of her third claim; or 3) filing a formal declaration of abandonment of the unexhausted claim. (See 1/3/00 Order at 7-9.)

On January 25, 2000, following an enlargement of time, Petitioner filed a Memorandum of Points and Authorities in Support of her Petition ("Pet. Mem."). On February 4, 2000, Petitioner filed a Supplemental Memorandum of Points and Authorities in Support of Petition for Habeas Corpus, in which Petitioner attempted to demonstrate that she had exhausted the first subpart of her third claim. (See Doc. No. 15.) The Court found that Petitioner had failed to demonstrate that this claim was exhausted, and apprised Petitioner of the options of dismissing her Petition in order to exhaust this claim in state court or filing a notice of intent to formally abandon the unexhausted claim. (See 2/22/00 Order at 6-9.)

On March 6, 2000, Petitioner filed a Formal Notice of Abandonment of the unexhausted claim. (See Doc. No. 18.) On May 22, 2000, following an enlargement of time, Respondent filed an Answer ("Ans.") to the Petition accompanied by a Memorandum of Points and Authorities in support thereof, and lodged a number of documents with the Court. On July 31, 2000, following an enlargement of time, Petitioner filed a Traverse ("Trav.").

II.

BACKGROUND

On April 19,1996, following a jury trial in the San Diego Superior Court, Petitioner was convicted of one count of second degree murder with the personal use of a firearm. (See Pet. at 1, Clerk's Transcript ["CT"] at 404.) Petitioner was found not guilty of first degree murder and not guilty of voluntary manslaughter. (CT 403, 405.) Petitioner was sentenced to a state prison term of 15 years to life plus a consecutive 4-year term for the firearm enhancement. (CT 409.)

Petitioner contemporaneously filed an appeal from her conviction and a petition for writ of habeas corpus in the California Court of Appeal. (See Lodgment Nos. 1 and 7.) On June 18, 1998, the California Court of Appeal, in an unpublished opinion, affirmed Petitioner's conviction and denied her petition for writ of habeas corpus. (See Ans. Ex. 1.) Petitioner thereafter filed a Petition for Review in the California Supreme Court, which was denied without a statement of reasons on September 30, 1998. (See Pet. at 2; Ans. at 4.)

III.

UNDERLYING FACTS

The facts that follow are taken primarily from the California Court of Appeal opinion in People v. McNeil, No. D026047, slip op. at 2-5 (Cal. Ct. App. June 18, 1998). (See Ans. Ex. 1.) Federal habeas courts rely upon facts developed in state courts pursuant to 28 U.S.C.A. § 2254(e) (West Supp. 2000). See Sumner v. Mata, 449 U.S. 539, 545-47 (1981) (stating that deference is owed to factual findings of both state trial and appellate courts). Where a more specific factual

development of the record is appropriate for resolving Petitioner's individual claims, citations to the record are included in the discussion below.

Petitioner and her husband, Ray McNeil, the victim, met in June of 1987, and were married two months later. They were both former marines, bodybuilders and steroid users, and their marriage was marked by violent altercations with each other. Ray began physically abusing Petitioner within a month of the marriage, and had hit, kicked and pushed Petitioner, leaving her with bruises and black eyes. Petitioner had hit Ray and had thrown things at him, including dumbbells and a VCR she threw out a second story window as Ray walked below. Additionally, Petitioner had violent altercations with barroom bouncers, the police, and women with whom she suspected Ray had had affairs.

On the evening of February 24, 1995, Ray told Petitioner that he was going to the Price Club, which closed at 8:30 p.m., to purchase chicken for dinner. Ray did not return until 10:30 p.m. He had purchased chicken not at the Price Club, but instead at a more expensive market. Petitioner suspected that Ray had gone to see a girlfriend because Ray had had several affairs during their marriage. Petitioner criticized Ray for purchasing the more expensive chicken, and asked him what had taken so long and whether he had been with his girlfriend. Petitioner also told Ray he looked like "shit" and would not do well in an upcoming bodybuilding event.

Petitioner told police that Ray then slapped her, pushed her down on the floor and started choking her. Petitioner squirmed away, ran into the bedroom and took her shotgun out of its case in the closet. She grabbed two shells, loaded one, pumped the gun, and then "went out and aimed it at" Ray and shot Ray while he was at the stove cooking chicken. Petitioner stated that after she shot Ray, he doubled over and then came toward her.

She loaded the second shell, pumped the gun again, and shot Ray a second time. Petitioner then gave the gun to a neighbor and called 911. The 911 operator testified she heard a male, who had been moaning, ask: "Why did you shoot me?" and heard Petitioner respond: "I told you that I wasn't taking your shit anymore."

When the police arrived, Ray was on his hands and knees about five feet inside the apartment and Petitioner was standing at the kitchen sink. It looked as though Ray's face had been blown off from the bridge of his nose down, and he was saying "Why?", "Oh God," and "Help me." When paramedics arrived, Ray pointed to his stomach, and they saw his liver protruding through the skin. Ray was taken to the hospital and died that night. The shotgun wound to his midsection was the cause of death; the shotgun blast to his face caused massive damage to his lower jaw and face.

A police criminologist testified that the weapon used was a 12-gauge pump shotgun with a pistol grip, which was fired at Ray's midsection, and then at his face, from about six feet away. A crime scene reconstructionist opined that Ray's head was close to, and in line with, the sofa cushions when he was shot in the face, which would indicate that Ray was not upright when he was shot the second time.

Police found fingernail marks on Petitioner's neck the night of the shooting and Ray's body was exhumed so that his fingernails could be examined. His fingernails were very short, and it was determined that his hands could not have caused the marks on Petitioner's neck. It was also determined that the marks were inconsistent with manual strangulation and could have been self-inflicted.

IV.

PETITIONER'S CONTENTIONS

Petitioner contends, inter alia, the following:

(1) The trial court's removal over Petitioner's objection, of all references to malice aforethought from the jury instructions violated her Sixth and Fourteenth Amendment rights to have the jury find every element of the charged offense beyond a reasonable doubt;
(2) The trial court's failure to instruct the jury on the lesser included offense of involuntary manslaughter violated Petitioner's Fourteenth Amendment due process rights; and
(3) The trial court's cumulative errors in instructing the jury violated Petitioner's Fourteenth Amendment rights to due process and a fair trial because (i) the trial court improperly defined imminent peril in its imperfect self-defense instruction, and (ii) the trial court erroneously prevented the jury from considering evidence of Battered Women Syndrome in determining the reasonableness of Petitioner's actions.[1/] (See Pet. at 6-8.)

---

1. Petitioner formally abandoned a third subpart to her third claim. In that claim subpart, Petitioner contended that the trial court improperly denied a requested jury instruction which asked the jury to place themselves in Petitioner's position at the time of the shooting, knowing everything that Petitioner knew about her relationship with the victim. (See Pet. at 8; Formal Declaration of Abandonment at 1.)

V.

SCOPE OF REVIEW

Title 28, United States Code, § 2254(a), sets forth the following scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> 28 U.S.C.A. § 2254(a) (West 1994) (emphasis added).

The Petition was filed after the President signed into law the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Under 28 U.S.C. § 2254(d), as amended by AEDPA, the federal court must determine whether there is a qualifying state court decision addressing Petitioner's claims. If so, the federal court must determine whether: (1) the decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C.A. § 2254(d)(1), (2) (West Supp. 2000).

A state court's decision may be found to be "contrary to" clearly established Supreme Court precedent: (1) "if the state court applies a rule that contradicts the governing law set forth in [the Court's] cases" or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from

[the Court's] precedent." Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1519-20 (2000). A state court decision involves an unreasonable application of clearly established federal law, "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or, "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at 1520.

These two concepts overlap and it is sometimes necessary to test a petitioner s allegations against both standards. Van Tran v. Lindsey, 212 F.3d 1143, 1150 (9th Cir. 2000), cert. denied, 121 S. Ct. 340 (2000). If the question presented is treated as an issue of fact, the Court must analyze the question under the "unreasonable determination of the facts" prong of § 2254(d)(2). Torres v. Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000).

The California Supreme Court denied Petitioner's petition for review without setting forth its reasoning. (See Ans. at 4.) Therefore, this Court "looks through" to the underlying appellate court decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991) (federal courts "look through" state court's summary denial order to the last reasoned state court decision addressing the claim). Thus, the California appellate court's June 18, 1998 decision which rejected Petitioner's claims on their merits is the reasoned opinion this Court looks to pursuant to § 2254(d).

VI.

DISCUSSION

Respondent contends the Petition should be denied and dismissed because: (1) Petitioner's claim that the trial court erred in removing the term malice aforethought from the jury instructions does not state a federal claim; (2) although the trial court removed the term "malice aforethought" from the instructions, it did not remove the requirement that malice aforethought be proven beyond a reasonable doubt; (3) the United States Supreme Court has not established that Petitioner had a federal constitutional right to an instruction of the lesser included offense of involuntary manslaughter; (4) the California appellate court's denial of Petitioner's claim that the trial court erred in instructing the jury on imperfect self-defense was not an unreasonable application of federal law; and (5) the trial court's instruction that evidence that Petitioner suffered from Battered Woman Syndrome could not be used to determine the reasonableness of the belief she had in the need to act in self-defense did not amount to federal constitutional error, and even assuming it did, any error was harmless.

For all the following reasons, the Court recommends that the Petition be denied and dismissed.

A. Exclusion of the term "malice aforethought" from the jury instructions.

In her first claim, Petitioner contends that the trial court, over Petitioner's objections, erroneously eliminated all reference to the term "malice aforethought" in its jury instructions. Petitioner contends the exclusion of this term from the instructions deprived her of her Sixth and Fourteenth Amendment rights because it eliminated the requirement that the jury find malice aforethought, which is a necessary element

of second degree murder, beyond a reasonable doubt, or at the very least it lowered the prosecution's burden of proving beyond a reasonable doubt that Petitioner killed the victim intentionally and with either express or implied malice. Respondent contends this claim should be rejected because federal habeas relief does not lie for errors of state law. Alternately, Respondent argues that the trial court merely eliminated the word "malice" from the instructions, not the requirement that the components of malice be proven beyond a reasonable doubt.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991); see 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. Estelle v. McGuire, 502 US. at 67-68; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see also Dugger v. Adams, 489 U.S. 401, 409 (1989) ("the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution.").

To the extent Petitioner claims the jury instruction was incorrect under state law, her claim is not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. at 71-72. To merit relief, Petitioner must show the instructional error so infected the entire trial that the resulting conviction violated due process. Id. at 72; Henderson v. Kibbe, 431 US. 145, 154 (1977); Cupp v. Naughten, 414 U.S. 141, 147 (1973). The allegedly erroneous instruction must be considered in the context of the trial record and the instructions as a whole. Estelle v. McGuire, 502 U.S. at 72; Henderson v. Kibbe, 431 U.S. at 156; Cupp v. Naughten, 414 U.S. at 146-47. However, a trial court's failure to instruct the jury on all the elements of the charge is a structural error requiring automatic reversal. Sullivan v. Louisiana, 508 U.S. 275, 279-81 (1993); see also In re Winship, 397 U.S. 358, 364

(1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Thus, to the extent Petitioner is seeking habeas relief in this Court based on an alleged error in state law, the Court recommends denying relief because such a claim is not cognizable on federal habeas review. However, the Court does not read Petitioner's claim so narrowly. Rather, the Court finds that Petitioner's claim is cognizable on habeas review because she is contending that her Sixth and Fourteenth Amendment rights were violated by the trial court's elimination of the term "malice aforethought" in the jury instructions. She contends this omission constitutes a failure to instruct on all elements of the charged offense, and/or caused a lowering of the prosecution's burden of proving every element of murder beyond a reasonable doubt. Additionally, Petitioner contends that because voluntary manslaughter is a homicide where there is intent to kill but no malice, the trial judge completely eliminated the possibility of a conviction of voluntary manslaughter by removing the element of malice from the manslaughter instructions.

For the reasons set forth below, the Court finds that the jury was instructed on all the essential elements of the crimes charged. The Court also finds that the instructions did not lower the prosecution's burden of proof beyond a reasonable doubt on any of the elements of murder or manslaughter. Thus, there was no instructional error. Moreover, even assuming there was an instructional error, the Court finds that the instructions, considered in the context of the trial record and the instructions as a whole, did not so infect the entire trial that the resulting conviction violated due process.

1) Murder instructions

In its June 18, 1998, opinion, the California Court of Appeal denied Petitioner's claim that the trial court had erred in eliminating the term malice from the murder instructions, stating:

> The trial court modified the standard CALJIC instructions on murder and voluntary manslaughter by deleting all references to the term "malice." McNeil contends this was reversible error. We disagree.
>
> *Jury Instructions Regarding Murder*
>
> The court defined homicide as any killing of a human being, whether lawful or unlawful, and instructed that homicide includes murder and manslaughter, which are unlawful, and justifiable homicides, which are lawful. In lieu of CALJIC No. 8.10, which defines the elements of murder using the term "malice aforethought" the court stated that "Murder is of the first or second degree." It instructed on first degree murder using the standard version of CALJIC No. 8.20. The court then defined second degree murder in two ways. For the so-called "express malice" form, it used a modified version of CALJIC No. 8.30 (unpremeditated murder of the second degree), which defined second degree murder as "the unlawful killing of a human being when there is *manifested an intention unlawfully to kill* a human being but the evidence is insufficient to establish deliberation and premeditation." (Italics added.) For the so-called "implied malice" form, it used the standard version of CALJIC No. 8.31 (second degree murder -- killing resulting from unlawful act

> dangerous to life). Finally, because the term malice aforethought was removed h the instructions, the court did not give CALJIC No. 8.11, which defines malice aforethought.
>
> McNeil contends that by deleting the term malice aforethought from the murder instructions, the court removed the element of malice from the crime of murder. Not so. Even though the court did not use the specific term "malice," it properly defined this element as requiring proof beyond a reasonable doubt that McNeil "manifested an intention unlawfully to kill." (*People v. Swain* (1996) 12 Cal.4th 593, 601; see also *People v. Stanley* (1995) 10 Cal.4th 764, 796; *In re Christian S.* (1994) 7 Cal.4th 768, 778; *People v. Saille* (1991) 54 Cal.3d 1103, 1114-1115.) Accordingly, the element of malice was not removed from the jury's consideration in determining if McNeil was guilty of murder.

(See Ans. Ex. 1 at 5-6.)

The appellate court found that the jury had not been misled regarding the elements of murder because the essential definition of malice was included in the instructions, although the term itself was not. Thus, the appellate court found there was no instructional error, and consequently did not apply federal law to determine whether the purported error amounted to a violation of Petitioner's constitutional rights. This Court therefore cannot determine whether the appellate court's decision amounted to an unreasonable application of federal law. Rather, the Court must undertake to determine whether the holding was contrary to clearly established federal law. See Williams, 120 S. Ct. at 1519-20.

In order to merit habeas relief on this claim, Petitioner must show that the state court's determination was contrary to clearly established federal law. To do so, Petitioner must show either that the jury was not instructed on the elements of murder, or that the murder and manslaughter instructions, considered in the context of the trial record and the instructions as a whole, so infected the entire trial that the resulting conviction violated due process. Sullivan v. Louisiana, 508 U.S. at 279-81; Estelle v. McGuire, 502 U.S. at 72; Henderson v. Kibbe, 431 U.S. at 156; Cupp v. Naughten, 414 U.S. at 146-47.

Petitioner argues that both the trial judge and appellate court erroneously believed malice is synonymous with intent to kill, and that the trial judge was, in effect, instructing the jury that malice was presumed if the killing was intentional. (Pet. Mem. at 8; Trav. at 4.) Petitioner refers to a statement by the trial judge in response to defense counsel's objection to removing malice from the instructions stating that: "Malice aforethought is nothing different than intent; albeit intent without the provisos that make it voluntary, it is intent without heat of passion, intent without imperfect self-defense." (RT 3858; Pet. Mem. at 7-8.) Respondent concedes that the trial judge's comments that malice aforethought was extraneous in light of recent California Supreme Court opinions was incorrect (see Ans. at 17) but maintains that these comments, made outside the jury's presence, did not result in any instructional error. Respondent contends that although the term "malice aforethought" was eliminated from the instructions, the requirement that the components of malice be proven was not.

Petitioner is incorrect that the instructions equated malice with intent to kill. The jury was instructed that in order to find Petitioner guilty of second degree murder, it was required to find beyond a reasonable doubt that Petitioner manifested an intention unlawfully to kill the victim. (RT 4481.) The jury was also instructed that the prosecution bore the burden of proof

beyond a reasonable doubt that Petitioner had not acted in self-defense and had not acted in the heat of passion or a sudden quarrel. (RT 4475, 4484.) Thus, the instructions equated malice with "a manifested intention to unlawfully kill," not simply an intent to kill. Malice is defined in the California Penal Code as "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Cal. Penal Code § 188 (West 2000). The appellate court found that the jury was properly instructed on the elements of malice in regard to murder, without the actual use of that term, because they were instructed that they must find an intention to unlawfully kill in order to convict Petitioner of murder.

Petitioner contends that the trial court's definition turns the inquiry around; that her mental state at the time of the killing will depend upon whether the killing is later determined to be unlawful. Petitioner cites in support of this proposition one of the same cases the appellate court cited in support of its conclusion, In re Christian S., 7 Cal.4th 768, 872 P.2d 574, 30 Cal.Rptr.2d 33 (1994). However, the California Supreme Court in In re Christian S. found that the word "unlawfully" modified the word "intention" in Penal Code § 188 so as to require "an intent to act unlawfully, or put in everyday language, the defendant must have a wrongful intent." Id. at 778-79. The court rejected the notion that "unlawfully" refers not to intent but to whether the act was later found to be unlawful. Id. This case simply does not support Petitioner's position that the trial court instructed the jury that they could presume malice if they found the killing to be intentional. As the appellate court found, citing to this case, the jury was properly instructed that in order to convict Petitioner of murder they must find beyond a reasonable doubt that she "manifested an intention unlawfully to kill." (See Ans. Ex. 1 at 6.)

Petitioner also cites the recent California Supreme Court case of People v. Lasko, 23 Cal.4th 101, 999 P.2d 666, 96 Cal.Rptr.2d 441, cert. denied, 121 S. Ct. 355 (2000). Both Lasko and the companion case of People v. Blakeley, 23 Cal.4th 82, 999 P.2d 675, 96 Cal.Rptr.2d 451 (2000), reaffirmed the holding in In re Christian S. that a defendant who unintentionally kills in the actual but unreasonable belief in the necessity of self-defense, referred to as "imperfect self-defense," is not guilty of murder regardless of whether the defendant intended to kill the victim or merely injure the victim. Lasko, 23 Cal.4th at 109; Blakeley, 23 Cal.4th at 88. Blakeley held that when a defendant, acting with a conscious disregard for life, unintentionally kills in imperfect self-defense, the killing is voluntary, not involuntary, manslaughter. Blakeley, 23 Cal.4th at 88-89. Lasko held that a killer who acts in a sudden quarrel or heat of passion lacks malice and is not guilty of murder whether or not there was an intent to kill. Lasko, 23 Cal.4th at 109. These cases do not support Petitioner's position that the trial court instructed the jury that malice was to be presumed if the killing was intentional. As discussed below, the jury was instructed that whether or not Petitioner had the intent to kill, if the jury found that she acted in a sudden quarrel or heat of passion, or if she acted out of a belief, reasonable or unreasonable, in the necessity to defend against imminent peril to her life or great bodily injury, the offense is manslaughter and not murder. Moreover, the jury was instructed that the prosecution bore the burden of proving beyond a reasonable doubt that Petitioner had acted in a sudden quarrel or heat of passion, and that she had not acted in either perfect or imperfect self-defense. (RT 4475-76, 4483-84.)

The Court finds that the jury was properly instructed on all the elements of murder, including the requirements of malice aforethought. The Court also finds that the instructions did not lower the burden on the prosecution of proving every element of murder beyond a reasonable doubt. Therefore, the Court

finds that Petitioner is not entitled to habeas relief because she has neither shown an instructional error regarding the murder instructions nor demonstrated that an instructional error so infected the entire trial that the resulting conviction violated due process. Estelle, 502 U.S. at 72; Henderson, 431 U.S. at 154; Naughten, 414 U.S. 147.

2) Voluntary manslaughter instructions

In its June 18, 1998, opinion, the California Court of Appeal denied Petitioner's claim that the elimination of malice from the jury instructions prevented the jury from finding her guilty of manslaughter, stating:

> The court instructed the jury that "voluntary manslaughter is a lesser crime to murder," and defined voluntary manslaughter using a modified version of CALJIC 8.40 which omitted references to malice aforethought and the absence thereof:
>
> "Every person who unlawfully kills another human being with an intent to kill, is guilty of voluntary manslaughter in violation of [section] 192 [, subdivision] (a) of the Penal Code.
>
> "The specific intent for voluntary manslaughter, as opposed to murder, must arise upon one of [the] following circumstances:
>
> "One, an unprovoked quarrel or other unreasonable provocation. That is, the person committing the killing must be acting intentionally, but in the heat of passion aroused by circumstances which

would provoke an ordinarily reasonable person of average disposition to act rashly without deliberation and reflection.

"Or the specific intent for voluntary manslaughter, as opposed to murder, must arise upon:

"Two, an honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. That would be imperfect self-defense."

The court then distinguished murder from voluntary manslaughter using a slightly modified version of CALJIC No. 8.50. The standard version of CALJIC No. 8.50 states that the distinction between murder and manslaughter is that while both involve an intent to kill, murder requires malice, and manslaughter does not -- and when the slayer acts in heat of passion or sudden quarrel amounting to adequate provocation or in imperfect self-defense, malice is absent, even though the intent to kill is present. The trial court's modified version omitted the references to murder requiring malice and manslaughter not requiring malice, instead stating:

"When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation or in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury the offense is manslaughter. In such case, even if the

intent to kill exists, the law is that the killing is manslaughter and not murder.

"To establish that a killing is murder [and] not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or to great bodily injury."

The Court further defined imperfect self-defense as follows:

"A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter.

"An 'imminent' peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person."

McNeil contends her conviction for second degree murder must be reversed because the court "completely eliminate[d] the possibility of a conviction of voluntary manslaughter by taking away the element of malice from the manslaughter instructions." We disagree. Although the court omitted the term malice from its manslaughter instructions, it properly instructed the jury that to reduce an intentional killing from murder to manslaughter, "[t]he specific intent for voluntary manslaughter, as opposed to murder, must arise upon" heat of passion, sudden adequate or imperfect self-defense. (See *People v. Barton* (1995) 12 Cal.4th 186, 199.) Under these circumstances, malice is not present as a matter of law, and therefore, the court correctly advised the jury of the circumstances under which an intentional unlawful killing will be deemed voluntary manslaughter rather than murder. (See *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1439-1441.)

(See Ans. Ex. 1 at 6-9.)

The appellate court found that the jury was properly instructed that to reduce an intentional killing from murder to manslaughter, the specific intent for voluntary manslaughter, as opposed to murder, must arise upon heat of passion or sudden adequate or imperfect self-defense. The court found that because malice is not present as a matter of law under these circumstances, the jury was properly instructed regarding the circumstances under which an intentional unlawful killing will be deemed voluntary manslaughter rather than murder.

Petitioner again points to the trial judge's rationale for removing malice from the instructions, arguing that the judge equated malice with intent, and that the prejudice is obvious

from the missing element. As discussed above, although the term "malice" was not used in the instructions, the element of malice was not removed from the instructions. Petitioner also contends that the jury was confused because the court deprived the jury of the concept of an unlawful intent to kill as a benchmark with which to compare Petitioner's intent to the intent required for murder and manslaughter. Petitioner maintains that this is evident by their verdict of guilty to murder but not guilty of voluntary manslaughter. Respondent attributes the verdicts to the jury being instructed that they could return a partial verdict on homicide coupled with the fact that they found Petitioner not guilty of first degree murder.

Contrary to Petitioner's contention, language equivalent to the statutory definition of malice was included in the instructions setting forth the elements of murder and manslaughter. The verdicts of not guilty of voluntary manslaughter, guilty of second degree murder and not guilty of first degree murder, are consistent with the finding that Petitioner did not premeditate the killing but also did not have a belief, reasonable or otherwise, that she was acting in self-defense when she killed the victim. Although the jury was instructed not to sign the voluntary manslaughter verdict form if they found Petitioner guilty of first or second degree murder (RT 4488) they were also instructed that: "you're to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach tentative conclusions on the charged and lesser crimes before reaching any final verdict." (RT 4487.) Although it is unclear why the jury executed the verdict form finding Petitioner not guilty of voluntary manslaughter, there is simply no basis for Petitioner's contention that this was the product of confusion caused by the

redaction of the term "malice aforethought" from the instructions.

The Court finds that the jury was adequately instructed on the elements of voluntary manslaughter and the relationship of voluntary manslaughter to murder and that Petitioner has neither shown an instructional error nor demonstrated that an instructional error so infected the entire trial that the resulting conviction violated due process. Estelle, 502 U.S. at 72; Henderson, 431 U.S. at 154; Naughten, 414 U.S. 147. Accordingly the Court finds that the state courts' rejection of Petitioner's first claim was not contrary to clearly established Supreme Court law. See Williams, 120 S. Ct. at 1523. The Court therefore recommends denying habeas relief on Petitioner's first claim. See 28 U.S.C.A. § 2254(d) (West Supp. 2000).

B. Failure to instruct the jury on involuntary manslaughter.

Petitioner next contends that the trial court violated her right to present a complete defense guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution by failing to give a requested jury instruction on involuntary manslaughter. Petitioner argues that because evidence was presented that she meant only to spray the victim with shotgun pellets to stop him from further attacking her, and did not intend to kill him, she was entitled to an involuntary manslaughter instruction.

Clearly established federal law requires giving a lesser-included offense instruction in a capital case if there is evidence to support the instruction. Hopper v. Evans, 456 U.S. 605, 611 (1982); Beck v. Alabama, 447 U.S. 625, 638 (1980). However, in Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995), overruled on other grounds by, Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999), the Ninth Circuit held that because there is currently an

intercircuit split on whether the application of the legal principles announced in Hopper and Beck apply in the context of non-capital offenses, such an application would be barred by Teague v. Lane, 489 U.S. 288 (1989). Turner, 63 F.3d at 818-19.

Petitioner replies that Turner involved a situation where the instruction was not requested by the defense, and applies only to situations where the trial court has a duty to sua sponte instruct on a lesser included offense. She relies on a footnote in Conde v. Henry, 198 F.3d 734 (9th Cir. 2000), (which was subsequently removed when the case was amended on denial of rehearing), in which the Court found it unnecessary to reach the respondent's argument that there is no federal constitutional right to a lesser included offense instruction in a non-capital case because the defendant properly requested the instruction based on the defense theory of the case. Not only was the footnote upon which Petitioner relies removed, but Conde applied pre-AEDPA standards and relied on law which was "clearly established" in he Ninth Circuit, not clearly established law as announced by the United States Supreme Court. Conde, 198 F.3d at 738-739.

The Court finds there is no clearly established federal law as announced by the United States Supreme Court which requires a lesser included instruction to be given in a non-capital case. Turner, 65 F.3d at 818-19. Respondent contends, correctly, that to the extent there is no clearly established United States Supreme Court precedent which provides a constitutional right to have a lesser included instruction given in a non-capital case, this Court cannot grant habeas relief as to this claim under the "contrary to" prong of § 2254(d). See Williams, 120 S. Ct. at 1506 ("It is perfectly clear that AEDPA codifies Teague to the extent that Teague requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.");

Teague, 489 US. at 301 (federal habeas court may only apply a rule "dictated by precedent existing at the time the defendant's conviction became final.").

However, this does not end the inquiry. In Williams v. Taylor the Court held that a state court decision involves an unreasonable application of clearly established federal law "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 120 S. Ct. at 1520. In light of the substantial number of cases extending the principles of Beck and Hopper to the non-capital context (see e.g., Turner, 65 F.3d at 819) it is possible for this Court to find that the state court unreasonably refused to extend the legal principles in Beck and Hopper requiring a trial court to sua sponte instruct on a lesser included offense in a capital context to the context of a trial court's refusal to give a requested lesser included instruction in a non-capital case. However, the Court need not reach that issue here. Even assuming the state court unreasonably refused to extend the legal principles announced in Beck and Hopper to Petitioner's case, the Court finds, for the following reasons, that Petitioner has failed to demonstrate that she was entitled to such an instruction. Further, the Court finds that even assuming the instruction should have been given, any error was harmless.

To set aside a conviction based on an omitted jury instruction, a federal habeas court must find that the jury instruction should have been given, and that the omission of the instruction "so infected the entire trial that the resulting conviction violates due process." Kibbe, 431 U.S. at 154 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)); see Prantil v. California, 843 F.2d 314, 317 (9th Cir. 1988); see also Hopper v. Evans, 456 U.S. at 611 (due process requires that a defense instruction be given "only when the evidence warrants

such an instruction."). Where the alleged error is the failure to give an instruction, the burden on the petitioner is "especially heavy." Kibbe, 431 U.S. 145.

In its June 18, 1998, opinion, the California Court of Appeal denied Petitioner's claim, stating:

> McNeil argues that a lesser included offense instruction on involuntary manslaughter should have been given because there was evidence that she merely acted "without due caution and circumspection" as opposed to with the intent to kill. In support, she cites testimony by a psychologist that McNeil had said she only intended to scare Ray when she shot him and thought she could "spray" him without the impact being lethal, as well as the psychologist's opinion that McNeil was hyper-vigilant regarding danger once it started and responded almost automatically to her perception of danger.
>
> Nevertheless, in order for McNeil to be entitled to a[n] involuntary manslaughter instruction, whether requested or sua sponte, there had to be "sufficient evidence for a reasonable juror to find [she] acted without consciously realizing the risk to [Ray's] life." (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.) Such evidence is not present in this case. On the contrary, the evidence was that McNeil, a former marine and the owner of a 12 gauge, pistol-grip, pump-action shotgun, loaded this weapon and intentionally shot Ray from about six feet away as he was frying chicken. After she hit Ray in the midsection and he doubled over McNeil reloaded and shot him in the face. The only inference the jury could draw from the evidence presented was that

> McNeil knew and understood the risk her actions posed to Ray's life. (See *id.* at pp. 596-597.) Accordingly, the court did not err in failing to instruct on involuntary manslaughter.

(See Ans. Ex. 1 at 11-12.)

Petitioner contends there was sufficient evidence to support an instruction on involuntary manslaughter. She points to evidence indicating she told Dr. Kaser-Boyd that Ray had choked her that night and that she knew of a wrestling associate whom Ray had murdered by breaking her neck, which scared Petitioner. (RT 2647-48.) Petitioner told Dr. Kaser-Boyd that she retrieved the gun to protect herself, and that she thought the gun would spray buckshot and only scare Ray. (RT 2649, 2771.) Dr. Kaser-Boyd formed the opinion that Petitioner was hyper-vigilant to the danger that existed once Ray started to choke her, and that she responded almost automatically to her perception of danger. (RT 2667.) There was testimony that the shotgun shell used contained #6 pheasant shot, which is messy when shot at close range and less messy at long range. (RT 1386, 3001.) Petitioner told the jury that she retrieved the shotgun to stop Ray from choking her by scaring him, and that she didn't want to kill him. (RT 3115, 3174.) Finally, Petitioner's daughter testified that she heard sounds consistent with Petitioner being slapped or choked. (RT 3034-36, 3040, 3044.)

Petitioner has failed to demonstrate that the involuntary manslaughter instruction should have been given. The appellate court found that under California law, the test for giving an involuntary manslaughter instruction would be whether there was "sufficient evidence for a reasonable juror to find [she] acted without consciously realizing the risk to [Ray's] life." (See Ans. Ex. A at 12, quoting People v. Evers, 10 Cal.App.4th 588, 596, 12 Cal.Rptr.2d 637 (1992)). Petitioner attacks this

finding by contending it is inconsistent with the rule that when determining whether an involuntary manslaughter instruction should be given, all doubts about the sufficiency of the evidence should be resolved in the defendant's favor. She contends the proper test is whether the evidence amounts to "that from which a jury composed of reasonable persons could conclude the defendant was guilty of the lesser crime," quoting People v. Glenn, 229 Cal.App.3d 1461, 1467, 280 Cal.Rptr. 609 (1991) (emphasis in original), abrogated by People v. Blakeley, 23 Cal.4th 82, 999 P.2d 675, 96 Cal.Rptr.2d 451 (2000).

In California, an involuntary manslaughter instruction should be given when the accused proffers evidence sufficient to "deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded'" that the particular facts underlying the instruction existed. People v. Flannel, 25 Cal.3d 668, 684, 603 P.2d 1, 160 Cal.Rptr. 84 (1979); see also Hopper v. Evans, 456 US. at 611 (due process requires that a defense instruction be given "only when the evidence warrants such an instruction."). The appellate court identified and applied the correct standard under state law, and found that Petitioner had not proffered sufficient evidence from which a reasonable jury could find that she did not have the intent to kill when she shot Ray. This Court reaches the same conclusion. The evidence referred to by Petitioner is not "sufficient evidence for a reasonable juror to find [she] acted without consciously realizing the risk to [Ray's] life." People v. Evers, 10 Cal.App.4th 588, 596, 12 Cal.Rptr.2d 637 (1992). Rather, the evidence relied upon by Petitioner goes to her state of mind regarding justification for the killing, not her awareness of whether her actions could have resulted in death. Thus, there was no instructional error.

However, even assuming the involuntary manslaughter instruction should have been given, Petitioner has failed to carry her "especially heavy" burden of showing that the omission of

the instruction "so infected the entire trial that the resulting conviction violates due process." Kibbe, 431 U.S. at 154; Estelle v. McGuire, 502 U.S. at 72; Cupp, 414 U.S. at 147. Here, the factual question posed by the omitted involuntary manslaughter instruction, i.e. whether Petitioner acted with an intent to kill, was necessarily resolved adversely to her under the instructions for murder. The jury found Petitioner guilty of second degree murder, which has as a required element either the intent to kill or a finding that Petitioner intentionally committed an act, the natural consequences of which are dangerous to human life, and that the act was performed with knowledge of the danger to or a conscious disregard for human life. (CT 271-72.) Involuntary manslaughter "is the unlawful killing of a human being without malice. . . . in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." Cal. Penal Code § 192(b) (West 2000). As the appellate court pointed out, Petitioner could not have been found guilty of involuntary manslaughter because the jury necessarily found she acted with malice when they convicted her of second degree murder. Therefore, Petitioner has failed to carry her "especially heavy" burden of showing that the omission of the instruction "so infected the entire trial that the resulting conviction violates due process." Kibbe, 431 US. at 154.

Based on the foregoing, the Court finds that the state court's rejection of Petitioner's second claim was not an unreasonable application of clearly established Supreme Court law. Williams v. Taylor, 120 S. Ct. at 1520. Accordingly, the Court recommends that this claim be denied. See 28 U.S.C.A. § 2254(d) (West Supp. 2000).

C. Petitioner has failed to demonstrate that she is entitled to habeas relief based on cumulative instructional errors.

Petitioner's final claim is that the cumulative effect of the errors in instructing the jury violated her Fourteenth Amendment rights to due process and a fair trial. Specifically, she contends: (i) the trial court improperly defined "imminent peril" in its imperfect self-defense instruction, and (ii) the trial court erroneously prevented the jury from considering Petitioner's Battered Woman Syndrome testimony in determining the reasonableness of Petitioner's actions. Respondent argues that the appellate court's denial of the claim that the trial court erred in instructing the jury on imperfect self-defense was not an unreasonable application of federal law. Respondent also contends that the trial court's instruction that evidence that Petitioner suffered from Battered Woman Syndrome could not be used to determine the reasonableness of her belief she had in the need to act in self-defense did not amount to federal constitutional error. Finally, Respondent contends that even assuming Petitioner can point to a constitutional error, any such error was harmless.

1) Imminent peril instructional error

The trial court instructed the jury regarding the requirement of actual but unreasonable belief in the need to defend against imminent peril to life or great bodily injury.

> A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but is not guilty of murder. This would be so even though a reasonable person in the same situation, seeing and knowing the same facts, would not have had the same belief. Such an actual but

> unreasonable belief is not a defense to the crime of voluntary manslaughter.
>
> An "imminent" peril is one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer as a reasonable person.

(CT 279.)

The trial court added the last sentence to the end of the standard instruction CALJIC No. 5.17. Petitioner contends that the last sentence improperly established a "reasonable person" test for the perception of imminent peril. Under California law, an honest belief, whether reasonable or unreasonable, that it is necessary to defend against imminent peril negates the element of malice aforethought, and the reasonableness of the belief merely goes to the justification for the killing. Flannel, 25 Cal.3d at 679. Thus, it was incorrect under state law for the trial court to add the last sentence to CALJIC No. 5.17.

In rejecting Petitioner's claim that the trial court's failure to properly define "imminent peril" caused her to be prejudiced, the California appellate court stated:

> McNeil also contends her conviction must be reversed because in defining "imminent peril" for purposes of imperfect self-defense, the court used the phrase "or must so appear at the time to the slayer *as a reasonable person.*" (Italics added.) We agreed that the term "reasonable person" should not have been used in the instruction (see *People v. Flannel* (1979) 25 Cal.3d 667, 679), and indeed, it appears from the record that it was included in the standard CALJIC No. 5.17 by mistake.

However, reversal is not required because "[e]rror cannot be predicated upon an isolated phrase, sentence or excerpt from the instructions since the correctness of an instruction is to be determined in its relation to the other instructions and in light of the instructions as a whole." (*People v. Wingo* (1973) 34 Cal.App.3d 974, 979.) Here, when all of the jury instructions on voluntary manslaughter and imperfect self-defense, are considered in their entirety, it is not reasonably likely that the jury would have misunderstood the requirements of the imperfect self-defense component of voluntary manslaughter. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Gomez* (1986) 183 Cal.App.3d 986, 992-993.) On the contrary, these instructions repeatedly informed the jury that if the defendant had an honest (or actual) but *unreasonable* belief in the need to act in self-defense, then the offense would be manslaughter and the defendant could not be convicted of murder. (See *People v. Flannel*, supra, 25 Cal.3d at p. 679.) Furthermore, in arguing to the jury, the prosecutor set forth the appropriate standard stating "[i]f you believe it is an imperfect self-defense, that she actually believed but that a reasonable person would not believe in the necessity for self-defense, that lessens the crime to what is called, 'voluntary manslaughter.'" (See *People v. Kelly*, supra, 1 Cal.4th at p. 526.)

(Ans. Ex. 1 at 9-10.)

Petitioner points out that the trial court instructed the jury that the court's pronouncement of the law, not the argument of counsel, was the one they were to follow, and it was therefore incorrect for the appellate court to rely on the prosecutor's statements as to the law as curing the instructional defect.

Although the jury was instructed to apply the law as stated by the judge, the argument of counsel is still a factor to be considered in analyzing Petitioner's claim. The instructional error must be considered in the context of the trial record and the instructions as a whole to determine whether the instructional error so infected the entire trial that the resulting conviction violated due process. Estelle v. McGuire, 502 U.S. at 72.

Petitioner also contends the jury was not properly instructed. Thus, she contends the appellate court erred in finding that the jury, by following other proper instructions, resolved the issue as to whether she had an honest belief that she was in imminent peril adversely to her. She contends the jury found her guilty of either implied malice second degree murder or second degree malice murder which did not require premeditation or deliberation. In either case, she contends the issue of imperfect self-defense was not resolved.

As discussed above, the jury was adequately instructed on malice as it relates to murder and manslaughter. They were instructed that if Petitioner held a belief, reasonable or otherwise, in the need for self-defense, she could not be found guilty of murder. The fact that Petitioner was convicted of second degree murder and found not guilty of voluntary manslaughter necessarily means that the jury rejected her imperfect self-defense claim. Although the imminent peril instruction was incorrect under state law with regard to the reasonableness of her perception of whether the peril was "apparent, present, immediate and must be instantly dealt with," this error does not provide a basis for habeas relief for the following reasons. Although the state court concluded that the jury instruction erroneously identified a reasonable person standard for determining whether imminent peril existed, federal habeas corpus relief does not lie for errors of state law, and federal courts may not reexamine state court determinations

on state law issues. Estelle v. McGuire, 502 U.S. at 68. The question on federal habeas is whether the alleged instructional error violated the Due Process Clause of the Fourteenth Amendment. Cupp, 414 U.S. at 147. The Supreme Court's decision in Estelle v. McGuire constitutes the clearly established law the Court must follow regarding this legal issue. See Spivey v. Rocha, 194 F.3d 971, 975 (9th Cir. 1999), cert. denied, __ S. Ct.__, 2000 WL 1337196 (Nov. 13, 2000); Houston v. Roe, 177 F.3d 901, 908-09 (9th Cir. 1999), cert. denied, 120 S. Ct. 1168 (2000). In relevant part, the Court in Estelle v. McGuire stated:

> [T]he fact that the [jury] instruction was allegedly incorrect under state law is not a basis for habeas relief. Federal habeas courts therefore do not grant relief, as might a state appellate court, simply because the instruction may have been deficient in comparison to the CALJIC model. . . . The only question for us is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record.

502 US. at 71-72 (citations, internal quote marks and footnotes omitted).

In sum, this Court cannot grant habeas relief simply because the instruction was allegedly incorrect under state law. Id. The only question is "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Id. at 72 (quoting Cupp, 414 U.S. at 147). Additionally, even were the Court to find that the instructional error rose to the level of constitutional error, it would be subject to the harmless error test of Brecht v. Abrahamson, 507 U.S.

19, 637 (1993)(error is harmless if it cannot be said to have "had substantial and injurious effect or influence in determining the jury's verdict."). Calderon v. Coleman, 525 U.S. 141,145-47 (1998); Sunia v. Bunnell, 998 F.2d 664, 667 (9th Cir. 1993).

The Court has considered the challenged jury instruction "in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. at 72. Given that context, the Court concludes there is no "reasonable likelihood" Petitioner's jury "applied the challenged instruction in a way that violates the Constitution." Id. The jury was properly instructed that Petitioner could not be convicted of murder if she believed she was acting in self-defense, whether that belief was reasonable or unreasonable, and further, that the prosecution had the burden of proof beyond a reasonable doubt that Petitioner did not act in self-defense. (RT 4475-86). This was the position taken by the prosecutor in closing argument. (RT 4382-87.) Viewed in the context of the entire trial and the instructions as a whole, Petitioner has not shown that the language included in the "imminent peril" instruction removed from the jury the opportunity to find that she acted in imperfect self-defense.

Moreover, even if the error did violate the Constitution, it was harmless because it cannot be said to have "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637; Coleman, 525 U.S. at 145-47. Accordingly, habeas relief is not warranted on this claim.

2) Battered Woman Syndrome testimony

Petitioner contends that the trial court erroneously prevented the jury from considering evidence of Battered Woman Syndrome in determining the reasonableness of her actions. Over Petitioner's objection, the trial court gave the following limiting instruction:

> Evidence has been introduced for the purpose of showing that the defendant suffered from Battered Woman Syndrome at the time of the killing. Such evidence, if believed, may be considered by you for the purpose of determining if it tends to show the actual belief of the defendant at the time of the killing. It is not admitted for purposes of determining the reasonableness requirement for perfect self-defense.

(CT 258.)

The appellate court acknowledged that subsequent case law rendered this instruction erroneous, but found the error to be harmless. The court stated:

> The court instructed the jury that the killing of another in self-defense is justifiable and not unlawful when the person actually and reasonably believes there is imminent danger that the other will kill her or cause great bodily injury and it is necessary to defend herself. As set forth above, the court also explained that "[a] person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, *but is not guilty of murder*." (Italics added.) Finally, it instructed that evidence that McNeil suffered from Battered Women's Syndrome at the time of the killing could be used in determining whether she had an actual belief in the need to defend herself, but could not be used in considering whether that belief was reasonable.
>
> This last instruction was erroneous because after the date of the trial, the Supreme Court held that evidence of Battered Women's Syndrome is relevant

> to the reasonableness, as well as the subjective existence of a defendant's belief in the need to act in self-defense. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1088-1089.) However, this error was harmless because the jury's verdict of murder demonstrates that it determined that McNeil did not have an actual belief in the need to act in self-defense. (See *id.* at p. 1089.) The jury was specifically instructed that if McNeil *had* an actual belief in the need to act in self-defense she could not be guilty of murder. Accordingly, whether McNeil *reasonably* believed in the need to act in self-defense became a moot issue.

(Ans. Ex. 1 at 10-11.)

As the appellate court observed, the instruction was erroneous under California law because evidence of Battered Woman Syndrome is relevant to both the reasonableness of Petitioner's belief in her need for self-defense as well as the subjective existence of such a belief. People v. Humphrey, 13 Cal.4th 1073, 1088-89, 921 P.2d 1, 56 Cal.Rptr.2d 142 (1996). Thus, it was error for the trial court to instruct that such evidence "is not admitted for purposes of determining the reasonableness requirement for perfect self-defense." However, as discussed above, habeas relief does not lie in this Court for errors of state law. Rather, this Court considers the challenged jury instruction "in the context of the instructions as a whole and the trial record," and the only question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 US. at 72. Additionally, even if such an error rises to the level of a constitutional error, it may be found to be harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 637; Coleman, 525 U.S. at 145-47.

The appellate court found that the error was harmless because the jury determined that McNeil did not have an actual belief in the need to act in self-defense, and therefore, whether she reasonably believed in the need to act in self-defense became a moot issue. Petitioner contends that the verdict of not guilty of voluntary manslaughter meant that the jury found there was no intent to kill, and therefore the jury was seriously considering Petitioner's self-defense claim. She contends that the jury could have found there was an actual belief in the need to act in self-defense but foundered on the erroneous definition of imminent peril being seen through the eyes of a reasonable person. The erroneous instruction therefore prevented the jury from applying the evidence of Battered Woman Syndrome to the issue of self-defense. Petitioner also points to the prosecutor's argument that Petitioner's choice to shoot Ray rather than terminate the relationship, leave the apartment or call the police, was not a reasonable choice.

Respondent argues that the conviction of murder indicated that the jury made a factual determination that Petitioner did not believe she was acting in self-defense. Thus, the instruction regarding the reasonableness of such belief was inapplicable and could not have prejudiced her. Respondent contends that the jury would have convicted Petitioner of voluntary manslaughter if they had found she had an unreasonable belief she was acting in self-defense, or acquitted her if she had a reasonable belief that she was acting in self-defense.

Although it was error under state law to instruct that evidence of Battered Woman Syndrome could not be used in considering whether the belief in the need to defend was reasonable, the error was not of constitutional magnitude. Considering the challenged jury instruction "in the context of the instructions as a whole and the trial record," the Court finds that "the ailing instruction by itself [did not] so infected the entire trial that the resulting conviction violates due process."

Estelle v. McGuire, 502 U.S. at 72. As the appellate court pointed out, the jury's verdict of guilty on the charge of second degree murder necessarily meant they found that Petitioner did not have a belief, reasonable or unreasonable, that she was acting in self-defense. Thus, the application of the Battered Woman Syndrome evidence to the determination whether that belief was reasonable was not necessary. Moreover, even if the error did rise to the level of a constitutional error, the error was harmless because it cannot be said to have "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 US. at 637. Accordingly, habeas relief is not warranted on this claim.

3) Cumulative error

Finally, Petitioner contends that the cumulative effect of these instructional errors warrants habeas relief. Where no single trial error in isolation is sufficiently prejudicial to warrant habeas relief, "the cumulative effect of multiple errors may still prejudice a defendant." U.S. v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996). Where "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." Id., quoting United States v. Wallace, 848 F.2d 1464, 1476 (9th Cir. 1988). "Where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." Frederick, 78 F.3d at 1381.

Petitioner contends that the cumulative effect of the instructional errors warrants habeas relief. These include the erroneous inclusion of the reasonable person standard in the imminent peril instruction as well as the instruction to exclude evidence of Battered Woman Syndrome in considering whether

Petitioner had a reasonable belief in the need to act in self-defense.[2/]

The Court finds that this is not a situation where the government's case was weak, thereby making it more likely that Petitioner was prejudiced by the cumulative effect of these errors. As discussed above, although there was instructional error regarding the reasonableness of the belief in imminent peril, the error was overshadowed by the correct instructions regarding self-defense as it relates to murder and manslaughter, by the instructions regarding burden of proof, and by the argument of counsel. In the case of the Battered Woman

---

2. Petitioner failed to exhaust and formally abandoned a third subpart of her claim, i.e., that habeas relief is warranted based on the cumulative effect of the trial court's erroneous instructions. Petitioner requested and the trial court declined to give a pinpoint instruction stating that: "In judging [Petitioner's] actions, you should attempt to place yourself in her position at the time of the incident. You should therefore consider her past and present knowledge, her beliefs, the relative size and strength of the participants, [the victim's] words and actions prior to the shooting, the history of their relationship, and all other factors bearing on the reasonableness of her actions and her apprehensions at the time as they appeared to her." (See Pet. at 8; Formal Decl. of Abandonment at 1; Ans. Exh. 1 at 13.) Even were to Court to consider this subpart of the cumulative error claim (see 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.")) the Court finds that such additional instructional error, if any, would not provide a basis for habeas relief for the same reasons discussed regarding the cumulative effect of the other instructional errors.

Syndrome, the error was rendered moot by the jury's implicit finding that Petitioner did not believe she was acting in self-defense.

Petitioner has failed to make a showing that she was prejudiced by any of the instructional errors. The Court finds that the cumulative effect of these errors also did not result in prejudice to Petitioner. Accordingly, the Court finds that the cumulative effect of the instructional errors does not provide a basis for habeas relief, and recommends denying relief based on Petitioner's third claim.

VII.

CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the undersigned Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be **DENIED** with prejudice and judgment entered accordingly.

IT IS ORDERED that no later than **January 31, 2001**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than **February 15, 2001**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's

order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED:Dec. 21, 2000

HON. CYNTHIA G. AARON
United States Magistrate Judge

CC: ALL PARTIES

APPENDIX D

APPENDIX D

[Filed July 10, 2001]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SALLY MARIE McNEIL,	)Case No. 99-1490-JM
	) (CGA)
Petitioner,	)
	) ORDER ADOPTING
v.	) REPORT AND
	) RECOMMENDATION RE:
RAYMOND L. MIDDLETON,	) DENIAL OF PETITION
Warden,	) FOR WRIT OF HABEAS
	) CORPUS
Respondent.	)
	)

Petitioner has filed objections to Magistrate Judge Aaron's Report and Recommendation re: Denial of Petition for Writ of Habeas Corpus ("R & R"). Respondent has not filed a response to the objections but informed the court that he would submit on the record before the court. For the reasons set forth below, the court adopts the R & R in its entirety and denies the petition for writ of habeas corpus.

DISCUSSION[1/]

Even though Petitioner raises essentially the same arguments which were analyzed in the R & R, she now

---

1. The court incorporates the R & R as if fully set forth herein.

contends that a recent Ninth Circuit decision, not considered in the R & R, mandates the grant of her petition. Petitioner contends that she was denied her constitutional right to present defense as outlined in DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001). The court will first discuss the arguments encompassed by DePetris before addressing the remainder of Petitioner's arguments.

The Right to Present a Defense

Kelly DePetris shot and killed her sleeping husband. At trial she claimed "imperfect self-defense." While not a complete defense to homicide, it negates malice and reduces murder to voluntary manslaughter. To prove her claim that she acted out of an actual fear that her husband would kill her and their baby that night, she sought (1) to introduce her husband's diary containing a chilling account of his violent behavior towards his first wife and others and (2) to testify about how having read the journal contributed to her belief that her husband's threats were to be taken seriously. The California Court of Appeal found that the trial court committed error in excluding the evidence but that the error was not prejudicial in light of other evidence presented to the jury to prove her credibility and the victim's propensity for violence. The district court denied habeas relief, similarly finding that the error was harmless in light or the entire evidentiary record.

The Ninth Circuit reversed the district court finding that the error was of "constitutional dimension." Id. at 1062. The Ninth Circuit reasoned:

> Because of the subjective aspect of imperfect self-defense, the trial court's erroneous preclusion of both the journal and especially petitioner's own testimony about having read it -- to explain why she did what she did -- was a crucial ruling. None of the other

> evidence adduced at trial could in any way make up for Kelly DePetris's own testimony about her state of mind, or for Dana DePetris's handwritten corroboration of it.

Id. at 1059. The Ninth Circuit further explained:

> The ruling went to the heart of the defense. Petitioner's sole defense was that she killed her husband in an honest belief that she needed to do so to save her life. The success of the defense depended almost entirely on the jury's believing petitioner's testimony about her state of mind at the time of the shooting. . . . There is simply no denying that the most important witness in the defense of Kelly DePetris was Kelly DePetris herself. The trial court not only excluded the journal, which would have corroborated petitioner's testimony, but worse still, it prevented petitioner from testifying fully in her own behalf about why she did what she did -- this in a case where proof of the defendant's state of mind was an essential element of the defense.

Id. at 1062-63. Because this evidence was critical to her ability to defend against the charges, the Ninth Circuit held that "the exclusion of this evidence violated petitioner's clearly established constitutional right to due process of law -- the right to present a valid defense." Id. at 1063.

The Ninth Circuit then went on to analyze whether the error had a "substantial and injurious effect or influence in determining the jury's verdict" as required by Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). The court concluded that the erroneous exclusion of evidence -- "especially petitioner's own testimony about it" -- was not harmless nor cured by other less compelling evidence.

Petitioner contends that the trial court's erroneous jury instructions on malice, the use of Battered Woman Syndrome ("BWS") testimony, and imperfect self defense, in combination with its refusal to provide an involuntary manslaughter instruction, effectively deprived her of her right to present a defense under DePetris. Petitioner then concludes that the petition should be granted because "there really is no difference between the case of Kelly Depetris [sic] and Sally McNeil." (Objections at p.7: 17-18). The difficulty with this argument is that the focus of DePetris is on the "erroneous exclusion of critical, corroborative defense evidence," id. at 1062, whereas Petitioner's arguments are directed towards erroneous jury instructions. DePetris is not an instructional error case. The Ninth Circuit repeatedly emphasized that DePetris's right to present a valid defense was violated when the trial court "precluded petitioner from testifying fully about her state of mind and from presenting evidence that would have corroborated her testimony." Id. at 1063.

The court rejects Petitioner's conclusion that there is no difference between the present action and DePetris. Here, Petitioner presents no argument that the trial court excluded or limited her testimony in any meaningful manner or that it excluded corroborating evidence. In light of the evidentiary issues at play in DePetris, the court concludes that the R & R appropriately analyzed the allegations of instructional error under the standard set forth by the Supreme Court in Estelle v. McGuire, 502 U.S. 62, 71-73 (1991). As in Estelle v. McGuire, "[t]he only question [] is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Id. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973).

In sum, the court rejects the notion that DePetris provides any legal precedent for analyzing Petitioner's claims of

instructional error. The court now turns to the claims of instructional error.

Instructional Errors

The R & R analyzed Petitioner's claim of instructional error in detail. Petitioner now reasserts essentially the same arguments raised before Judge Aaron. Instead or revisiting the same arguments, the court adopts Judge Aaron's thoughtful analysis in its entirety.

In sum, the court adopts the R & R in its entirety and denies the petition for writ of habeas corpus. The Clerk of Court is instructed to close the file.

IT IS SO ORDERED.

DATED: 7/9 , 2001

JEFFREY T. MILLER
United States District Judge

cc: All parties

APPENDIX E

APPENDIX E

01-56565.txt

petition for rehearing and petition for rehearing en banc filed with this court on 9/30/03. Fifty copies of the response shall be filed with the clerk of Court within 21 days from the date of this order. (Phoned parties, faxed panel) [01-56565] (ca)

10/21/03 Filed an original and 50 copies of Appellant Sally Marie McNeil's response to the Respondent's petition for rehearing and or suggestion for rehearing en banc filed on 9/30/03; served on 10/20/03. (PANEL and all active judges) [01-56565] (ca)

Docket as of November 6, 2003 11:15 pm Page 6

01-56565 McNeil v. Middleton, et al

10/29/03 Filed order (Robert R. BEEZER, Ferdinand F. FERNANDEZ, Richard A. PAEZ) The panel has voted unanimously to deny the petition for rehearing. Judge Paez has voted to deny the petition for rehearing en banc and Judge Beezer and Fernandez so recommend. The full court has been advised of hte [sic] petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the matter en banc. Therefore, the petition for panel rehearing and the petition for rehearing en banc are denied. [01-56565] (ca)

11/6/03 MANDATE ISSUED [01-56565] (ba)

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(2)

IN THE

SUPREME COURT OF THE UNITED STATES

No. 03-1028
OCTOBER TERM 2003

RAYMOND L. MIDDLETON
Warden,

Petitioner,

v.

SALLY MARIE McNEIL
Respondent,

RESPONSE TO PETITION FOR CERTIORARI

CHARLES R.KHOURY JR.
State Bar No. 42625
P.O. BOX 1066
WILTON N.H. 03086
Telephone: (603) 654-2050
Attorney for Respondent

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A. This Court's opinion in *Boyde v. California*, 494 U.S. 370 (1990), Speaks Directly to the Question Presented in the Petition for Writ of Certiorari, Mandating It's Denial..

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01-56565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SALLY MARIE McNEIL)
)
Petitioner and Appellant,)
)
v.)
)
RAYMOND L. MIDDLETON)
Warden, Valley State Prison for)
Women, Chowchilla, California)
Respondent-Appellee.)
)

RESPONSE TO PETITION FOR REHEARING

I

THE PROSECUTION'S PASSING REFERENCE TO VOLUNTARY MANSLAUGHTER AND IMPERFECT SELF DEFENSE DID NOT ERASE THE PATENTLY ERRONEOUS DEFINITION OF IMMINENT HARM GIVEN TO THE JURY IN WRITING AND ORALLY BY THE TRIAL JUDGE.

A. This Court's opinion in *Boyde v. California*, 494 U.S. 370 (1990), Speaks Directly to the Question Presented in the Petition for Writ of Certiorari, Mandating It's Denial.

The jury was given an unambiguously erroneous definition of

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"Imminent Harm" in written and oral instructions by the trial judge. This was conceded by the California Court of Appeal (CCA) (See page 68 of Pet. for Cert.). In no way could the prosecutor's passing reference to Voluntary Manslaughter as a lesser included offense ***erase*** this erroneous definition of imminent harm. This is especially so in view of the jury instruction telling the jury that it was the ***judge*** and not the attorneys who were the lawgivers in this case. That of course is also the reason for the statement by this Court in ***Boyde, supra,*** that what the judge says carries much more weight with the jury than arguments of counsel and the judge's instructions to the jury are "viewed as definitive and binding statements of the law." (494 U.S. at 384.)

The Petition must be denied on this basis alone.

B. We Know the Jury Paid no Attention Whatsoever to the Prosecutor's Statement as They Expressly Acquitted Sally McNeil of Voluntary Manslaughter.

The prosecutor told the jury the crime was lessened to voluntary manslaughter if they believed she unreasonably feared here husband and needed to defend herself with force. (Pet. For Cert at App. C at p.69.) The jury proceeded to actively ***acquit*** McNeil of voluntary manslaughter. If they

had heard, understood and applied the prosecutor's argument, they would either have found her a) guilty of voluntary manslaughter or b) found that the lesser offense did not apply at all and left the verdict form for voluntary manslaughter blank. They did neither, therefore sending a strong message that they paid no attention whatsoever to the passing reference by the prosecutor in argument on which the petition for certiorari is so heavily dependent. The Ninth Circuit opinion is absolutely correct that the jury likely followed the instructions of the judge and did not heed the passing reference by the prosecutor. (Pet for Cert App. A at p. 22) The petition should be denied.

II

THE JURY WAS ADDITIONALLY ERRONEOUSLY TOLD NOT TO USE ANY OF THE BATTERED WOMEN'S TESTIMONY TO ACQUIT MCNEIL ALTOGETHER.

The petition is totally silent about a second instructional error conceded by the CCA to have occurred. (See Pet. for Cert. App. A at pp.9-10.) The jury was ordered in writing and orally not to consider any of the extensive BWS testimony as it applied to perfect self-defense. Sally McNeil's defense was eviscerated by this erroneous instruction coupled with the erroneous definition of imminent harm previously discussed.

The petition should be denied for this reason alone.

III

THE TRIAL JUDGE ERRONEOUSLY AND UNCONSTITUTIONALLY EXCISED ANY MENTION OF THE TERM 'MALICE' FROM THE JURY INSTRUCTIONS, PROVIDING AN ADDITIONAL REASON TO DENY THE PETITION.

In a third error, not granted as part of the Certificate of Appealability, the trial court purposefully excised the term 'Malice' from every jury instruction including its definition. It is submitted that had Sally McNeil not prevailed in the Ninth Circuit, this failure to grant a COA as to excising Malice, an element of the crime, from the jury instructions would have been raised by a petition for certiorari. Since that step was unnecessary it is brought to this Court's attention as a further reason to deny Warden Middleton's Petition for Certiorari.

CONCLUSION

The Ninth Circuit correctly decided that a prosecutor's passing reference to unreasonable fear of harm in his summation did not correct the trial judges erroneous definition of imminent fear as being gauged through the eyes of a reasonable person. Because of the gravity of this error and that of the jury instruction limiting use of BWS evidence as they impacted the constitutional right of Sally McNeil to present a defense to the charge, the petition must be denied. Additionally, excision of the term malice from all the jury instructions is an underlying fatal error in this case which would have to be examined if certiorari were granted. Accordingly, the petition should be denied.

Respectfully submitted,

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TOTAL P.24